Petition

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NO. 81-912

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

JAMES CLICK, SR., EUGENE WEISS and ORRAL LAKE,

Petitioners,

v.

STATE OF IDAHO, EX REL JOHN V. EVANS, GOVERNOR; PETE T. CENARRUSA, SECRETARY OF STATE: WAYNE L. KIDWELL, ATTORNEY GENERAL: ROY E. TRUBY, SUPERINTENDENT OF PUBLIC INSTRUCTION; JOE R. WILLIAMS, AUDITOR, as the STATE BOARD OF LAND COMMISSIONERS; GORDON C. TROMBLEY, SUPERINTENDENT OF PUBLIC LANDS, and the IDAHO STATE BOARD OF HEALTH,

Respondents.

On Petition for A Writ of Certiorari To The Supreme Court Of The State of Idaho

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the supremacy clause of the United States Constitution violated by a State Supreme Court decision implementing a state statute which prohibits placer mining on Petitioners' valid placer claims located on federal land in a national forest, where such decision:

(a) prohibits placer mining activity on Petitioners' claims without a permit from the state;

(b) requires immediate restoration of the surface of Petitioners' claims, including elimination of mining related improvements constructed by Petitioners;

(c) requires relocation of Sherlock Creek through Petitioners' mining area; and

(d) imposes a lien on Petitioners' mining claims and equipment in order to enforce the court's order?

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JAMES CLICK, SR., EUGENE WEISS and ORRAL LAKE,

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STATE OF IDAHO EX REL JOHN V. EVANS, GOVERNOR: PETE T. CENARRUSA, SECRETARY OF STATE: WAYNE L. KIDWELL, ATTORNEY GENERAL: ROY E. TRUBY, SUPERINTENDENT OF PUBLIC INSTRUCTION: JOE R. WILLIAMS, AUDITOR, as the STATE BOARD OF LAND COMMISSIONERS; GORDON C. TROMBLEY, SUPERINTENDENT OF PUBLIC LANDS, and the IDAHO STATE BOARD OF HEALTH,

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On Petition For A Writ of Certiorari To The Supreme Court Of The State of Idaho

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PETITION FOR A WRIT OF CERTIORARI

James Click, Sr., Eugene Weiss and Orral Lake, hereby petition for a Writ of Certiorari to review the judgment of the Idaho Supreme Court in this case.

OPINION AND JUDGMENT BELOW

The Opinion of the Idaho Supreme Court was entered May 27, 1981 and appears at page 1a of the Appendix to this Petition. It is reported at 631 P.2d 614 (1981).

The Order of the Idaho Supreme Court denying Petition for Rehearing, entered August 17, 1981, appears at page 19a of the Appendix.

The Order of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, entered October 1, 1979, appears at page 20a of the Appendix. The order of the District Court is not reported.

The Order of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, entered January 23, 1979, appears at page 22a of the Appendix. This Order of the District Court is not reported.

The Memorandum Decision and Order of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, entered July 7, 1978, appears at page 25a of the Appendix. This Decision of the District Court is not reported.

The Decision of the Idaho Supreme Court in the first appeal taken in this case ("Click I") is reported at 97 Ida. 791, 554 P.2d 969 (1976).

JURISDICTION

The Judgment of the Idaho Supreme Court was entered May 27, 1981. The timely Petition for Rehearing was filed June 12, 1981. The Order of the Idaho Supreme Court denying the Petition for Rehearing was entered August 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Article 4, Sec. 3, para. 2 of the United States Constitution provides in pertinent part:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; . . ."

Article 6, para. 2 of the United States Constitution provides:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Title 30, Sec. 26 of the United States Code provides:

> "The locators of all mining locations made on any mineral vein, lode or ledge, situated on the public domain, their heirs

> and assigns, where no adverse claim existed on the 10th day of May, 1872 so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical sidelines of such surface locations."

Title 30, Sec. 35 of the United States Code provides in pertinent part:

> "Claims usually called 'placers', including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; . . ."

Title 30, Sec. 601 of the United States Code provides in pertinent part:

> "The Secretary, under such rules and regulations as he may prescribe, may dispose of mineral materials . . . and vegetative materials . . . on public lands of the United States . . . if the disposal of such mineral or vegetative materials (1) is not otherwise expressly authorized by law, including but not

> limited to, . . . the United States mining laws, and (2) is not expressly prohibited by laws of the United States, and (3) would not be detrimental to the public interest . . . as used in this subchapter, the word "Secretary" means the . . . Secretary of Agriculture where the lands involved are administered by him for national forest purpose . . ."

Title 30 of the United States Code, Sec. 21(a) provides in pertinent part:

> "The Congress declares that it is the continuing policy of the federal government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help insure satisfaction of industrial, security and environmental needs, . . ."

Title 30 of the United States Code, Sec. 612 provides in pertinent part:

> "(a) Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.
>
> "(b) Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right

of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States) . . . provided, however, that any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto: . . . provided, further, that nothing in Section 601, 603, and 611 to 615 of this Title shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the 98th Meridian relating to the ownership, control, appropriation or use, and distribution of ground or surface waters within any unpatented mining claim.

"(c) Except to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto, or for the construction of buildings or structures in connection therewith, or to provide clearance for such operations or uses, or to the extent authorized by the United States, no claimant of any mining claim hereafter located under the mining laws of the United States shall, prior to issuance of patent therefor, sever, remove, or use any vegetative or other surface resource thereof which are subject to management or disposition of the United States under subsection (b) of this Section. Any severance or removal of timber which is permitted under

> the exceptions of the preceding sentence, other than severance or removal to provide clearance, shall be in accordance with sound principles of forest management."

The Idaho Dredge and Placer Mining Protection Act is contained in Idaho Code, Secs 47-1312 through 47-1324. Idaho Code, Sec. 47-1314 provides in pertinent part:

> "Where any person, . . . conducts a dredge or other placer mining operation on lands and beds of streams in the State of Idaho, it is hereby required that the ground disturbed thereby shall be by such operator leveled and smoothed over reasonably comparable with the natural contour of the ground prior to such disturbance, and to a condition conducive to the growth of verdure, and any water course disturbed by such dredging shall be by such operator replaced on meander lines with pool structure conducive to good fish and wildlife habitat and recreational use . . ."

Section 47-1317 provides in pertinent part:

> ". . . (c) it shall be unlawful for any person . . . to conduct dredge or other placer mining operations in this State without first having obtained a permit as herein provided . . .
>
> "(i) The Idaho State Board of Land Commissioners shall have the power to deny any application for a permit . . . on any unpatented mining claims, upon its determination that a dredge mining operation on the land proposed would not be in the public interest. . ."

Section 47-1323 provides in pertinent part:

> "Dredge mining in any form shall be prohibited on: . . .
>
> "(3) the St. Joe River, including tributaries. . ."

Section 47-1324 provides in pertinent part:

> "The State Board of Land Commissioners may maintain an action in the name of the State of Idaho to enjoin a person . . from operating or maintaining a dredge or placer mine without holding a valid permit therefor as provided in this Act. . . . If at the trial the operation and maintenance of dredge or placer mine without a permit be established, and the court further finds that it is probable the defendant will continue therein or in similar violations, the court shall enter a decree perpetually enjoining said defendant . . . from thereafter committing said or similar actions in violation of this Act."

The United States Forest Service regulations pertaining to surface mining in national forests is contained in 36 CFR Sec. 252 et. seq. Sec. 252.1 provides:

> "It is the purpose of these regulations to set forth rules and procedures through which use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws (30 U.S.C. 12-54), which confer a statutory right to enter upon the public lands to search for minerals, shall be conducted so as to minimize adverse environmental impacts on National Forest

System surface resources. It is not the purpose of these regulations to provide for the management of mineral resources; the responsibility for managing such resources is in the Secretary of the Interior."

Section 252.2 provides in pertinent part:

"These regulations apply to operations hereafter conducted under the United States mining laws of May 10, 1872, as amended (30 U.S.C. 22 et. seq.), as they affect surface resources on all National Forest System land under the jurisdiction of the Secretary of Agriculture to which such laws are applicable . . ."

Section 252.4 provides in pertinent part:

"(a) . . . A Notice of intention to operate is required from any person proposing to conduct operations which might cause disturbance of surface resources . . . if the District Ranger determines that such operations will likely cause significant disturbances of such resources, the operator shall submit a proposed plan of operations to the District Ranger . . .

"(b) . . . Upon approval of a plan of operations, operations shall be conducted in accordance with the approved plan . . .

"(e) At any time during operations under an approved plan of operations, the authorized officer may ask the operator to furnish a proposed modification of the plan detailing the means of minimizing unforeseen significant disturbance of surface resources . . .

"(f) On completion of an environmental analysis in connection with each proposed operating plan, the authorized officer will determine whether an environmental statement is required . . ."

Section 252.5 provides in pertinent part:

"(d) In the provisions for review of operating plans, the Forest Service will arrange for consultation with appropriate agencies of the Department of the Interior with respect to significant technical questions concerning the character of any geologic conditions and special exploration and development systems . . ."

Section 252.7 provides in pertinent part:

"(a) Forest Officers shall periodically inspect operations to determine if the operator is complying with regulations of this part and an approved plan of operations . . ."

Section 252.8 provides in pertinent part:

"All operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest surface resources, including the following requirements:

(a) Air quality. Operators shall comply with applicable federal and state air quality standards, including the requirements of the Clean Air Act, as amended (42 U.S.C. 1857 et. seq.).

(b) Water Quality. Operator shall comply with applicable state water quality stan-

dards, including regulations issued pursuant to the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151 et. seq.).

(c) Solid Waste. Operator shall comply with applicable federal and state standards for the disposal and treatment of solid wastes . . . all tailings, dumpage, deleterious materials or substances and other waste produced by operations shall be deployed, arranged, disposed or or treated so as to minimize adverse impact upon the environment and Forest Service resources.

(d) Scenic Values. Operator shall, to the extent practicable, harmonize operations with scenic values . . .

(e) Fisheries and Wildlife Habitat. In addition to compliance with water quality and solid waste disposal standards required by this section, operators shall take all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operation.

(f) Roads. Operator shall construct and maintain all roads so as to insure adequate drainage and to minimize or, where practicable, eliminate damage to soil, water and other resource values . . .

(g) Reclamation. Upon exhaustion of the mineral deposit or at the earliest practicable time during operations, or within one year of the conclusion of operations, unless a longer time is allowed by the authorized officer, operator shall where practicable reclaim the surface

disturbed in operations by taking such measures as may prevent or control on-site and off-site damage to the environment and forest surface resources including:

(1) Control of erosion and landslides;
(2) Control of water runoffs;
(3) Isolation, removal or control of toxic materials;
(4) Reshaping and revegetation of disturbed areas, where reasonably practical; and
(5) Rehabilitation of fisheries and wildlife habitat.

(h) Certification or other approval issued by state agencies or other agencies in compliance with the laws and regulations relating to mining operations will be accepted as compliance with similar or parallel requirements of these regulations."

Section 252.9 provides in pertinent part:

"During all operations, operator shall maintain his structures, equipment and other facilities in a safe, neat and workmanlike manner . . ."

Section 252.11 provides in pertinent part:

"Operator shall comply with all applicable federal and state fire laws and regulations and shall take all reasonable measures to prevent and suppress fires . . ."

Section 252.13 provides in pertinent part:

> "(a) Any operator required to file a plan of operation shall, when required by the authorized officer, furnish a bond conditioned upon compliance with Sec. 252.8(g), prior to approval of such plan of operations . . ."

STATEMENT OF THE CASE

Petitioners are residents of Montana doing business as a mining partnership. In 1969, Petitioners began dredge mining activities on their valid unpatented placer claims (Kismet Claims) located on federal land in the St. Joe National Forest (now the Idaho Panhandle National Forest). The mining claims are located on Sherlock Creek, a tributary of the St. Joe River. Petitioners' activities consisted of stripping vegetation, constructing a dike along Sherlock Creek, excavating some dredge ponds and moving a dredge and other associated equipment onto the property, all in preparation for their mining of the placer deposits located on the claims. These facts are recited in the parties' Stipulation dated August 22, 1973, pertinent parts of which appear at page of the Appendix[1] and in the District Court's initial Memorandum Decision, Findings of Fact, Conclusions of Law and Order dated March 5, 1975, which appears at page of the Appendix.

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1 "App." refers to the Appendix to this Petition.
"Rptr. Tr." refers to Reporter's Transcript on Appeal to the Idaho Supreme Court.
"Cl. Tr." refers to Clerks Transcript on Appeal to the Idaho Supreme Court.

In 1972, Respondents commenced an action in the State District Court for the County of Shoshone (Civil No. 17120) seeking to enjoin Petitioners' mining activities under the Idaho Dredge and Placer Mining Protection Act ("the Act"). Respondents also sought immediate restoration of the area already affected by Petitioners' mining activity. A preliminary injunction was entered enjoining Petitioners' mining activity during pendency of the litigation. Petitioners counterclaimed, seeking declaratory judgment, holding that enforcement of the Act against them violated Article 4, Section 3 of the United States Constitution and other Constitutional provisions. (App. 39a) In 1975, the Idaho District Court held that the Act was in conflict with the power of the federal government to manage and dispose of public domain land under Articles 4 and 6 of the United States Constitution. The District Court dissolved the preliminary injunction and enjoined Respondents from enforcing the Act against Petitioners.

Respondents appealed to the Idaho Supreme Court which rendered its decision, ("Click I") on September 24, 1976. State ex rel Andrus v. Click, et al., 97 Ida. 796, 554 P.2d 969. The Idaho Supreme Court reversed the District Court decision, holding that the requirements of the Act regarding permit and restoration did not, on the face of the statute, render it impossible for Petitioners to conduct mining operations on their claims in exercise of rights granted by the federal mining law. Finding no direct collision between the Act, on its face, and those rights granted to Petitioners by federal law, the Idaho Supreme Court remanded the case back to the State District Court, Shoshone County, for continuation of the proceedings on Respondents' original complaint.

On March 18, 1977, the Idaho Legislature amended Idaho Code, Sec. 47-1323 to prohibit "dredge mining in any form" on Sherlock Creek, being a tributary of the St. Joe River.

In March, 1978, on remand to the District Court, Shoshone County, (Civil No. 17120), Respondents continued the litigation by filing a motion seeking another preliminary injunction against Petitioners' mining activities pending resolution of the action, as well as a motion to consolidate the hearing on this injunction with a hearing on the issues raised by the original complaint and answer. These proceedings sought prohibition of further mining activity on Sherlock Creek and restoration of the area affected by Petitioners' mining, pursuant to Idaho Code, Sec. 47-1314. Hearing was held on both matters May 9, 1978. The District Court limited the scope of this hearing to the sole question of the amount of reclamation work needed to restore the mining claims to the condition they were in prior to Petitioners' mining activities, although

Mr. Weiss testified, without objection that restoration of the surface of the claims and relocation of Sherlock Creek, as Respondents proposed, would interfere with the mining of Petitioners' claims (Rptr. Tr. Vol. 2, pp. 433 and 434). During the hearing the parties agreed that the work done by Petitioners on the claims was done in a minerlike manner. (Cl. Tr. p. 52; Rptr. Tr. Vol. 2 of 2, p. 467) Beyond this the Court would not hear testimony regarding the effect of restoration on Petitioners' mining operation and refused to consider the effect of the 1979 amendment to Idaho Code, Sec. 47-1323 prohibiting placer mining on Sherlock Creek. The Court reasoned that the Act required issuance of the preliminary injunction prohibiting further mining and requiring restoration because Petitioners had never received a permit under the Act. The District Court rendered its Memorandum Decision and Order on July 7, 1978, holding that Petitioners were perpetually enjoined from further operations unless and until such time as they secured a permit under the Act and, further, that immediate restoration of the impacted area was required. (App. 25a) This Order further appointed the Director of the Idaho Department of Lands as a Special Master to develop a restoration plan and oversee restoration. The Order further provided that should Petitioners fail to comply with the restoration plan, the State could implement the plan and the cost thereof would constitute a lien on Petitioners' mining claims.

On January 23, 1979, the District Court entered its Order for a temporary stay of the restoration work, extension of the lien securing cost of the restoration plan to include Petitioners' machinery located on the mining claims, enjoining Petitioners from removing their machinery from the mining claims and requiring notice of

hearing with respect to the Special Master's restoration plan. (App.22a)

The hearing was held in July, 1979 on Respondents' proposed restoration plan. The District Court limited the scope of this hearing to evidence explaining the proposed restoration plan. It refused to hear evidence on whether the restoration work would render it impossible for Petitioners to mine their claims because Petitioners had not applied for a permit and refused to consider the effect of the 1977 amendment to Section 47-1323 prohibiting placer mining on Sherlock Creek. (Rptr. Tr. pp. 57-58 and Reptr. Tr. on Motions, p. 55)

On October 1, 1979, the District Court entered its Order approving Respondents' plan of restoration and denying Petitioners' request for stay of the order requiring immediate restoration. The plan of restoration requires relocation of Sherlock Creek through the center of the placer deposit on the Kismet Claims, filling in of the dredge ponds and restoration of topsoil in the mining area. (Cl. Tr. Re: July 1979 Hearing, Restoration Plan Exhibit)

Petitioners appealed the District Court's decisions to the Idaho Supreme Court. The decision of the Court, filed May 27, 1981, affirmed the order of the District Court. (App. 1a) In doing so, the Idaho Supreme Court held that there was no conflict between the Act and the Court's order implementing the Act, on the one hand, and the federal mining law, on the other hand. The Idaho Court gave essentially four reasons for its holding:

(a) Federal law concerning mining in National Forests (viz. the Forest Service Regulations, 36 CFR part 252) contain permit, bond and re-

storation requirements that are similar to those contained in the Idaho Act;

(b) there was not sufficient evidence in the record that the restoration ordered by the Court would make it impossible for Petitioners to mine their claims;

(c) the amendment to the Act prohibiting placer mining on Sherlock Creek (Idaho Code, sec. 47-1323) was not put in issue by Petitioners; and

(d) Petitioners never applied for a permit.

The question sought to be reviewed by this case is whether the permanent injunction and restoration plan ordered by the District Court, coupled with the provisions of Idaho Code, Sec. 47-1323 prohibiting mining on Sherlock Creek, would so burden the exercise of Petitioners' rights specifically granted by federal law with respect to their mining claims, as to bring the Act into direct collision with federal legislation. This preemption issue was initially raised by Petitioners in their Answer (App.38a) and at every stage of the proceeding thereafter. As the State Supreme Court stated: "The proceeding on remand to the District Court after Click I involved the issues raised by the original complaint and Answer." (App4a)

After remand, Petitioners argued the issue in their Prehearing Memorandum, dated May 3, 1978, in response to the hearing set by the District Court (App. 44a) In the Prehearing Memorandum, Petitioners argued that Click I stood for the proposition that the Idaho Dredge and

Placer Mining Protection Act provisions requiring a permit and restoration, in absence of implementation, did not conflict with federal law. Petitioners further argued that because of the amendment to the Idaho Code, Sec. 47-1323 prohibiting mining on Sherlock Creek, the application to the State Agency for a permit under the Act was a useless gesture and that the District Court should not order restoration of Petitioners' mining claims prior to completion of their mining operations because such restoration would render further mining impossible.

At the hearing held May 9, 1978 Petitioners orally argued to the Court that Section 47-1323, coupled with Respondents' proposed restoration, would bring the Act into direct conflict with federal law permitting mining of the Kismet Claims. The Court refused to permit evidence of the effect of immediate restoration on Petitioners' mining operation, stating:

> "So, I think really all we need to address ourselves to at this point is the extent of restoration that would be required, unless the permit is received." (Tr. Vol. 1 of 2, p. 25)

The Court refused to consider the effect of the 1977 amendment to Idaho Code, Sec. 47-1323 prohibiting placer mining on Sherlock Creek, although recognizing that the Kismet Claims fell within the area affected by the statute:

> "Mr. Marcus cross examined. He asked if Mr. Weiss under Idaho Code, Sec. 47-1323 would get a permit if he applied for one now. Mrs. Kettlewell objected . . . The Court doesn't think anyone could say he would or wouldn't except for the Land Board.

> Section 47-1323 was read to the witness. Mrs. Kettlewell objected to a question as it being redundant. Objection was sustained, but the Court will recognize the physical location of the claims as being within the statute 47-1323." (Cl. Tr. p. 53)

This argument was again presented to the District Court in Petitioners' Post Trial Memorandum filed May 23, 1978 (App.48a) Again, Petitioners raised the preemption argument in their Memorandum in Opposition to Plaintiffs' Motion for Injunction, filed with the District Court in 1978. (App. 51a)

The preemption argument was repeated at the hearing held July 6, 1979:

> "The Court: I would have to agree that the interference with the dredge operations wasn't a consideration in the Order for the restoration plan.
>
> "Mr. Marcus: In other words, your Honor, whether it interferes with the dredge operation isn't relevant to the adequacy of the restoration plan?
>
> "The Court: I wouldn't think so. I might ask a question. Has there ever been an application made for a permit yet?
>
> "Mr. Marcus: Your Honor, there has been no application because the State Land Department is prohibited by law from issuing a permit. And it would be a useless frivolous task to make an application for a permit that would be void if issued.

* * * * *

"The Court: Under what circumstances, then, does the dreding ever become an issue?

"Mr. Marcus: Well, it becomes an issue because the Supreme Court specifically says that the State cannot prohibit mining. If it did prohibit mining, it was a direct conflict with the federal mining law.

"The Court: I recognize that part of it. That's why I have always been of the opinion that that statute was unconstitutional. And until a permit is applied for, how can you test the constitutionality of it?

"Mr. Marcus: Well, I think the law is quite clear, your Honor, that an individual doesn't have the responsibility of performing a task that would be useless and would be nothing but an expense for him when the agency to which he has applied is prohibited by law from taking the step that he has requested."
(Rptr. Tr. on Motions, p. 53)

During the hearing, Petitioners attempted to testify that the proposed restoration would render further mining of their claims impossible. The Court would not consider the issue of whether the restoration plan conflicted with the mining operation and would not permit testimony with respect to that question. In response to Petitioners' request to lay a foundation with respect to this issue, the following colloquy took place:

"The Court: I might make the observation that the question of whether or not it interfered with dredge mining was not an issue as far as I was concerned. Would this satisfy it?

"Mr. Marcus: I take that to mean that whether or not it interferes with the dredge mining would not affect your interpretation . . .

"The Court: That's correct, I think, at this stage.

"Mr. Marcus: . . . with respect to the propriety of the plan or the timing of this implementation?

"The Court: Insofar as it would affect dredge mining, yes. I would agree with that.

"Mr. Marcus: And mining of their lode deposits?

"The Court: No, I wouldn't go that far. I think the only issue that I am talking about is the dredge mining. Lode mining is an entirely different thing. And I would permit you to proceed as to whether or not it would interfere with lode mining operations.

"Mr. Marcus: But you wouldn't let us proceed with the line of questioning about whether or not the restoration, if implemented now, would intefere with the dredge mining operations?

"The Court: Right. I think that is immaterial at this point." (Rptr. Tr. on Motions, pp 57-58)

Petitioners again raised the preemption issue in their Motion for Stay Pending Appeal, dated July 3, 1979, filed with the District Court and also their Motion for Stay of District Court Orders and Opposition to Plaintiff-Respondents' Request for Extension of Time Within Which to File Reply Brief, filed with the Idaho Supreme Court on July 5, 1979. (App. 56a) The preemption issue was directly argued to the Idaho Supreme Court on appeal from the State Court decisions in their Brief pertinent excerpts of which appear in the Appendix at page 59a, and in oral argument to the Court. Petitioners again argued the preemption issue in their Petition for Rehearing filed with the Idaho Supreme Court June 12, 1981.

ARGUMENT

Petitioners contend that the entire scheme of the implementation of the Idaho Dredge and Placer Mining Protection Act in this case, i.e. immediate restoration of the surface of the mining claims, relocation of Sherlock Creek through the center of Petitioners' mining area, prohibition of mining on Sherlock Creek and imposition of a lien on Petitioners' property in order to enforce implementation, all taken together, prohibit the exercise by Petitioners of rights granted under the federal mining laws and impermissably conflict with congressional regulation and disposition of federal land. The supremacy clause in the Constitution precludes enforcement of the State Act in the manner required by the Idaho Courts.

Petitioners' use of the Kismet Claims is subject to an extensive federal regulatory and statutory scheme which provides for both the development of the claims' mineral resources

and protection of the local environment. The federal government has authorized a specific and exclusive use of the federal land encompassed by the Kismet Claims, which authorization carries with it a grant of specific rights to Petitioners. The Idaho Supreme Court correctly summarized those rights in Click I:

> "The foundation for federal mining law was laid by the act of May 10, 1872, 17 Stat. 91 (codified at 30 U.S.C., Sec. 21 et. seq.) That Act provides that, in order to encourage development of mineral resources, citizens may enter and explore the public domain with the purpose of locating valuable mineral deposits. 30 U.S.C., Sec. 22. The locator has the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, 30 U.S.C., Sec. 26. These provisions are equally applicable to placer miners. 30 U.S.C., Sec. 35. In addition, the locator is granted the right to remove surface vegetation and to cut timber as may be necessary for mining purposes as well as to appropriate needed water. 30 U.S.C., Sec. 612; see also 54 Am. Jur. 2d Mines and Minerals, Sec. 57 (1971). In order to retain his claim the locator is required to expend $100 of labor or improvements each year. 30 U.S.C., Sec. 28. The locator may obtain fee title to the land by meeting the requirements necessary to obtain a patent. 30 U.S.C., Sec. 29". (97 Ida. 795)

The power to manage and dispose of surface resources located on the Kismet Claims is vested in the United States Forest Service, Department

of Agriculture, subject to the Petitioners' right to use the surface for their mining operations and uses reasonably incident thereto. 30 U.S.C., Secs. 601 and 612. Sec. 612 specifically delineates Petitioners' rights with respect to surface resources located on the Kismet Claims, vis-a-vis the administering agency. The Forest Service has adopted an extensive regulatory scheme pertaining to surface mining on the Kismet Claims. 36 C.F.R., Part 252 et.seq.; United States v. Weiss (9th Cir.1981), 642 F.2d 296. These regulations require an operations plan and reclamation assured by bond. Sec. 612 permits state law to determine only the "ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim." The Forest Service regulations do not permit the state to veto or otherwise exercise concurrent jurisdiction over mining operations congressionally approved on federal land.

This case closely parallels the case of Ventura County v. Gulf Oil Corporation (9th Cir. 1979), 601 F.2d 1080; Aff'd 100 S.Ct. 1593, 445 U.S. 947 (1980). In that case, Ventura County sought to enjoin Gulf's oil drilling activities until it had secured a permit from the county. Gulf was subject to extensive regulation by federal agencies. The county ordinance in Gulf authorized the local agency to deny an application for permit if the proposed activity would not be in the "public interest". The Idaho Act not only has the same veto provision (Section 47-1317), but also specifically prohibits placer mining in the area of Petitioners' claims (Section 47-1323). In Gulf, the Ninth Circuit held that the supremacy clause of the Constitution precluded enforcement of the local ordinance, following: Kleppe v. N.Mexico (1976), 426 U.S. 529; Federal Power Commission

v. Oregon (1955), 349 U.S. 435; Hines v. Davidowitz (1941), 312 U.S. 52; and Jones v. Rath Packing Company (1977), 430 U.S. 519. The Ninth Circuit held that the state could not prohibit use of federal land which was specifically authorized by the federal government. It rejected Ventura's argument that there was no conflict between the local ordinance and federal law since Gulf had never applied for a permit:

> "We disagree. This argument ignores the very relief that Ventura sought when it asked to enjoin Gulf's operations. Ventura cannot bring an action seeking immediate recognition and implementation of its veto power over the government's lessee, and successfully contend that an adverse ruling would require "seeking out conflict" unnecessarily. The issue is whether Ventura has the power of ultimate control over the government's lessee, and this issue persists whether or not a use permit would eventually be granted." (601 F.2d 1085) [2]

The Ninth Circuit likewise rejected Ventura's argument that there was no conflict because the

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[2] This holding implicitly rejects the Idaho Court's argument that there was insufficient evidence to prove that implementation of the State Act would render it impossible for Petitioners to mine their claims and that Petitioners had failed to raise the amendment to Section 47-1323 as an issue. Moreover, the record on appeal to the Idaho Supreme Court, as cited in "Statement of the Case" herein, is replete with rulings by the District Court preventing Petitioners from introducing evidence or argument with respect to these two issues.

federal law required observance of State standards, holding that there was no federal recognition of concurrent State jurisdiction. To the same effect is American Horse Protection Association v. United States Dept. of Interior (9th Cir. 1977), 551 F. 2d 432). Both of these arguments were crucial to the Idaho Court's decision in this case.

In this case, the State of Idaho has effectively prohibited a use of federal land specifically authorized, encouraged and regulated by federal law. The Idaho Supreme Court decision in this case is contrary to the Ninth Circuit Court of Appeals Decision in Ventura and the Supreme Court's Decision in Kleppe. Because of the growing importance of mineral resource development on federal land, the State's power to exercise concurrent jurisdiction should be clarified.

CONCLUSION

The Petition for Writ of Certiorari should be granted, and the Judgment below should be reversed.

Respectfully submitted,

Barry Marcus
737 North 7th Street
Boise, Idaho 83702
Counsel of Record

Of Counsel:
Marcus & Marcus
737 North 7th Street
Boise, Idaho 83702
(208) 342-3563

I HEREBY CERTIFY that on this ____ day of November, 1981, a true and correct copy of the foregoing Petition for Writ of Centiorari was duly given by deposition copy of same in the United States mails, first-class, postage prepaid, addressed to:

DAVID LEROY
Attorney General
State of Idaho
Statehouse
Boise, Idaho 83720

which are all of the parties required to be served.

_____

Barry Marcus

Appendix

APPENDIX

IN THE SUPREME COURT
OF THE STATE OF IDAHO

No. 13057

STATE OF IDAHO, ex rel. JOHN V. EVANS, Governor, PETE T. CENARRUSA, Secretary of State; WAYNE L. KIDWELL, Attorney General; ROY E. TRUBY, Superintendent of Public Instruction; and JOE R. WILLIAMS, Auditor, as the State Board of Land Commissioners; GORDON C. TROMBLEY, Superintendent of Public Lands, and the IDAHO STATE BOARD OF HEALTH,

Plaintiff-Respondent,

v.

JAMES CLICK, SR., EUGENE WEISS and ORRAL LAKE, individually and as a mining partnership,

Defendants-Appellants.

Filed: May 27, 1981

Rehearing Denied: August 17, 1981

Appeal from the District Court of the
First Judicial District of the
State of Idaho, Shoshone County

Before: James G. Towles, District Judge

Appeal from order enjoining mining operation and requiring restoration under Idaho Dredge and Placer Mining Protection Act. Order affirmed.

Barry L. Marcus, Boise, for appellants.

David H. Leroy, Attorney General, Ursula I. Kettlewell and Roy L. Eiguren, Deputy Attorneys General, State of Idaho, for respondents.

McFADDEN, J.

The defendants-appellants are residents of Montana doing business in Idaho as a mining partnership. In 1969, they commenced dredge mining activities on unpatented federal land in the St. Joe National Forest (now the Idaho Panhandle National Forest.) The mining claims are located adjacent to Sherlock Creek, a tributary of the St. Joe River.

In 1972, the plaintiff-respondent State of Idaho commenced an action against the appellants seeking to enjoin their mining activities under the Idaho Dredge and Placer Mining Protection Act, I.C. § 47-1312 et seq., until they secured a permit under the act.[1] The

[1]See I.C. § 47-1317 (a), (c), § 47-1324. It is uncontested that the appellants have never applied for or been issued a permit under the Act.

complaint also sought restoration of the area already impacted. I.C. § 47-1324, 47-1314. A temporary restraining order was sought, and granted, halting the mining ponding determination of the state's motion for a preliminary injunction. This order was dissolved due to the concurrent prosecution of a federal action concerning the same mining operation. However, the federal courts abstained pending resolution of the state action, and the state's earlier motion for a preliminary injunction was again set for hearing. The district court granted this motion and enjoined appellants' mining during the pendency of the litigation. Appellants soon thereafter answer the complaint and filed a counterclaim seeking declaratory relief in the form of a holding that the act was unconstitutional under one or more theories. In 1975, the district court held the Idaho act in conflict with the power of the federal government to manage and dispose of public domain land under the Property Clause (U.S. Const. Art. IV, § 3, cl. 2) and therefore had to fail under the Supremacy Clause (Art. VI cl. 2). The court then dissolved the preliminary injunction and enjoined the state from enforcing the act against the appellants.

Upon the state's appeal, this court in State ex rel. Andrus v. Click, 97 Idaho 791, 554 P.2d 969 (1976) (Click I), reversed the decision, holding that there was no conflict between the state and federal laws as they applied to this situation sufficient to invoke the preemption of the Supremacy Clause. The case was re-

manded for continuation of proceedings upon the state's original complaint.

In March 1978, on remand, the State continued the litigation by filing a motion seeking another preliminary injunction against the appellants' mining activities pending resolution of the action as well as a motion to consolidate the hearing on this injunction with a hearing on the issues raised by the original complaint and answer. See I.R.C.P. 65(a). These proceedings essentially sought prohibition of further activity on Sherlock Creek and restoration of the extant impact pursuant to I.C. § 47-1324. Hearing was held on both matters in early 1978. The district court rendered a decision on July 7, 1978, holding that the appellants were perpetually enjoined from further operations unless and until such time as they secured a permit under the act and, further, that immediate restoration of the impacted area was required. This order further appointed the director of the Idaho Department of Lands as a special master to oversee restoration and in the process provide a restoration plan. Should the appellants fail to comply with this plan, the order stated, the State could implement the plan and the costs thereof would constitute a "lien" on the appellants' property.

After this decision was entered, one of the appellants did some earth moving activity at the site of the mining operations without prior leave of the district court. The court found the appellant in contempt for violating the terms of the injunction.

In January 1979, the district court entered an order, to operate pending appeal, which stayed the restoration provisions of the July 1978 order (initially for one year); extended the "lien" provided for in the earlier order to cover the appellants' machinery as well as their claims; and enjoined the appellants from moving any of their equipment from the site without prior court authorization.

A hearing was held in July 1979 on the state's proprosed restoration plan which had been prepared pursuant to the provisions in the earlier orders. An order was subsequently entered approving the State's plan.

The appellants have appealed the decisions of the district court enjoining their mining operations, requiring restoration, imposing the "lien" on their claims and machinery, and awarding costs and attorney fees to the State relative to the contempt charge.

Appellants first contend that the order requiring restoration impermissibly conflicts with federally granted mining rights and thus, under Click I, must fail.

The question of conflict between state and federal law in this situation and any consequent preemption under the Supremacy Clause was addressed at length in Click I. It would serve no purpose to reiterate that entire discussion here. The court held in Click I:

> "We find no such conflict (sufficient for pre-emption) is presented by the provisions of the Idaho Act requiring a permit or the restoration of the land. Neither the requirement of obtaining a permit or of restoring the land render it impossible to exercise rights specifically granted by the federal legislation, although they may make it more difficult." (Footnote omitted.) 97 Idaho at 797, 554 P.2d at 995.

Appellants state in their brief that enforcement of the Idaho act would "prevent" further mining. However, an analysis of the testimony of the appellant Weiss, certainly the evidence most supportive of this argument, indicates only that restoration would "interfere" with the mining and increase the costs of the operation. The expert testimony offered by the State indicated that restoration and mining activity were compatible though mining is made more difficult. The conclusion that these apparently dissimilar goals are generally viewed today as concurrently achievable is further evidenced by federal mining law with which the Idaho act is alleged to conflict; that is, federal law concerning mining on national forest land itself has analogous "permit," bond, and restoration components. See generally 36 CFR 252. [2]

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[2]By decision issued April 13, 1981, in United States v. Weiss, No. 78-2800, the Ninth Circuit Court of Appeals has determined

In general, appellants' contention that the restoration requirements render it factually "impossible" for appellants to exercise federal mining rights, and thus come within the above quoted portion of Click I, is not supported by the evidence. Without such a showing, Click I is dispositive upon this point. There is substantial and competent evidence contrary to the appellants' contention in this regard which supports the conclusions reached by the district court. The order of restoration is therefore affirmed. Cougar Bay Co. Inc. v. Bristol, 100 Idaho 380, 383, 597 P.2d 1070, 1073 (1979).

The appellants raise a subsidiary issue in regard to the restoration requirement. They contend that certain language in the act, found in I.C. § 47-1314, limits the time at which a requirement to restore the area may be imposed to that period after the conclusion of mining operations. Therefore, they argue, since they have not concluded their plans for mining in the Sherlock Creek area, the injunction mandating restoration is premature.

Footnote 2 continued:
that these Forest Service regulations, which require, inter alia, an "operations plan" and reclamation assured by bond, were applicable to appellants' mining activities. While appellants argued there, as here, that no regulations could operate to infringe upon or lessen their "federal mining rights," the Ninth Circuit held:

> "We believe that the important interests involved here were intended to

Appellants, in this regard, place great reliance upon the last sentence in I.C. § 47-1314, which states:

> "Lands dredged or placered to be smoothed and watercourses replaced. --Where any person, firm, or corporation conducts a dredge or other placer mining operation on lands and beds of streams in the state of idaho, it is hereby required that the ground disturbed thereby shall be by such operator leveled and smoothed over reasonably comparable with the natural contour of the ground prior to such disturbance, and to a condition conducive to the growth of verdure, and any watercourse disturbed by such dredging shall be by such operator replaced on meander lines with pool structure conducive to good fish and wildlife habitat and recreational use. Whenever a dredging or other placer operation results in

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Footnote 2 continued:

and can coexist. The Secretary of Agriculture has been given the responsibility and the power to maintain and protect our national forests and the lands therein. While prospecting, locating and developing of mineral resources in the national forests may not be prohibited nor so unreasonably circumscribed as to amount to a prohibition, the Secretary may adopt reasonable

> the substantial removal of topsoil, as determined by the state land board, the operator shall be required to restore the land to its original condition, by the addition of topsoil and the planting of grass, trees and other vegetation, insofar as is reasonably possible after the conclusion of the dredging operation." (Appellants' emphasis.)

This reliance is misplaced.

At the outset it can be observed that the specific language emphasized by appellants in the above section appears to concern the problem of replacing topsoil and planting vegetation when substantial amounts of topsoil have been removed during the dredging operation. The more general requirement of restoring the land contours and watercourses disturbed as set forth in the first part of this section contains no such arguably restrictive language. Appellants, however, choose to argue that this single phrase should be construed to halt all

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Footnote 2 continued:

> rules and regulations which do not impermissibly encroach upon the right to the use and enjoyment of placer claims for mining purposes.[5]
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> . . .

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[5]We emphasize that the reasonableness of the regulations has not been put into issue. Although authority exists for the promulga-

restoration until after the appellants have decided that their operations have been concluded.

We must consider appellants' contentions in this regard in light of well established rules of statutory construction. Where there is ambiguity or where language is capable of more than one construction, the consequences of a proposed interpretation should be considered. Smith v. Dept. of Employment, 100 Idaho 520, 522, 602 P.2d 18, 20 (1979); Lawless v. Davis, 98 Idaho 175, 177-8, 560 P.2d 497, 499-500 (1977). Resolution should be in favor of reasonable operation of the statute. The statute will not be deprived of its potency if a reasonable alternative exists since the legislature is presumed not to have enacted a meaningless statute. State v. Rawson, 100 Idaho 308, 312, 597 P.2d 31, 35 (1979); Maguire v. Yanke, 99 Idaho 829, 836, 590 P.2d 85, 92 (1978); State v. Gibbs, 94 Idaho 908, 911, 500 P.2d 209, 212 (1972). The plain, obvious and rational meaning is always preferred to any hidden, narrow or irrational

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Footnote 2 continued:

tion of regulations, those regulations may, nevertheless, be struck down when they do not operate to accomplish the statutory purpose or where they encroach upon other statutory rights. Appellants have not attempted to comply with the regulations; therefore, those issues are not before us on this appeal. Compare Agins v. City of Tiburon, 447 U.S. 255, 258-262, 100 S. Ct.

meaning. Higginson v. Westergard, 100 Idaho 687, 691, 604 P.2d 51, 55 (1979); Nagel v. Hammond, 90 Idaho 96, 408 P.2d 468 (1965). And stated policy grounds may be utilized to determine the meaning of the statute. Smith, supra; Summers v. Dooley, 94 Idaho 87, 89, 481 P.2d 318, 320 (1971).

To hold here that the restoration clearly mandated by the act is inapplicable to the appellants' operation because they have yet to complete mining would be a perverse construction of the act. As noted, the language relied upon is not so broad. But more importantly, the very purpose of the statute belies such an interpretation. Approved by an overwhelming margin of the people as an initiative measure in 1954, the act's stated purpose, in I.C. § 47-1312, is "to protect the lands, streams and watercourses within the state, from destruction by dredge mining and by placer mining, and to preserve the same for the enjoyment, use and benefit of all of the people. . . ." Even the present litigants have stipulated to the purposes of the act. See Click I, supra, 97 Idaho at 801, 554 P.2d at 979. Appellants' view would allow any and every mining operator to enter Idaho, ignore the permit and bonding requirements of the act, strip and dredge vast areas, and leave them in that condition without any concern for restora-

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Footnote 2 continued:

2138, 2140-2142, 65 L.Ed.2d 106, 111-112 (1980)."

tion so long as they felt they hadn't "completed" their mining. Such an interpretation would emasculate the act and completely defeat every stated purpose recognized in the act or by the parties. This court refuses to follow such a course. Neither this argument nor the preemption agrument, supra, persuades the court that the restoration order of the district court was in error.[3]

Appellants next contend that they were excused from the permit requirement of the act. They make no persuasive argument as to why they were not subject to the act's requirements as of their commencement of operations in 1969 (see I.C. §47-1317(a) which requires application for a permit before a person or corporation may conduct a dredge or other placer mining operation). Similarly, they make no persuasive argument why they were not subject to

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[3]While appellants also contend that they were only engaging in "preparation" and were not yet mining under the act, the state's expert witnesses testified to the contrary. Further, the act itself provides a definition of mining for the purposes of the act, and the record establishes that the appellants came within that definition. See I.C. § 47-1313. It is, as previously mentioned, uncontested that the appellants have never applied for a permit, much less held one, prior to commencement of their activities in 1969 or since.

the requirement up to the time the district court ruled the act unconstitutional in 1975. The injunction prohibiting mining and mandating restoration is valid as to the consequences of the appellants' activities during these periods.[4]

Appellants further argue that the permit was not required after this court's decision in 1976 (Click I) because after this court held the act constitutional the state was then forced to seek another injunction against the appellants. This is palpably false; appellants confuse applicability of the act with its enforcement.

Appellants continue in this style of argument stating that the effect of an amendment to the act also operated to relieve them of the obligation to obtain a permit. In 1977, the Idaho legislature amended I.C. § 47-1323 to include the St. Joe River and its tributaries among those Idaho waterways upon which dredge mining would be prohibited. 1977 Sess. Laws,

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[4]While an argument might be made to the effect that any activity undertaken during the period between the decision of the district court holding the Idaho act unconstitutional and the decision of this court in Click I reversing that determination was not subject to the proscriptions of the act, appellants fail to make any showing of special or identifiable activity during this period. Without such evidence, the argument, even if correct, does not affect the ruling of the court prohibiting further mining activity and requiring restoration of the impact on the area which occurred from 1969 on in the absence of the required permit and bond.

ch. 114, p. 246. This section makes direct reference to the national legislation mandating protection for certain declared Wild and Scenic River Systems. See 16 U.S.C. § 1271, et seq. The St. Joe was placed in this national system the year following the Idaho legislature's amendment. 16 U.S.C. § 1274(a)(23). Appellants' basic contention in this regard is that the state was foreclosed, under the amendment, from issuing a permit after 1977, therefore their failure to apply for or obtain a permit was excusable. However, the putative effect of the 1977 amendment was never put into issue below. Indeed, the district court stated time and time again that this question was not involved in this litigation. Issues not raised and considered below will not be considered for the first time on appeal. McNeil v. Gisler, 100 Idaho 693, 696, 604 P.2d 707, 710 (1979); Unigard Ins. Group v. Royal Globe Ins. Co., 100 Idaho 123, 127, 594 P.2d 633, 637 (1979); Heckman Ranches, Inc. v. State, 99 Idaho 793, 799-800, 589 P.2d 540, 546-547 (1979).

Moreover, regardless of the amendment's effect in 1977, the injunction prohibiting mining and requiring restoration under the act was already warranted due to appellants' admitted failure to ever obtain a permit or post bond, either prior to commencing mining activities in 1969 or thereafter. The possible or arguable effects of the 1977 amendment of the permit requirement of the act are immaterial to the questions raised by this appeal.

The appellants next argue that the 1977 amendment constitutes a "taking" of their property (in the form of federal mining rights) and that they must be compensated therefor. Again we need not address this question as it was neither raised nor considered below. McNeil, supra; Unigard Ins. Group, supra. Furthermore, this question is the precise subject of another action brought by the appellants against the state of Idaho in the courts of the First Judicial District--a fact we judicially notice. I.C. 9-101(3). There being substantial questions of law and fact involved in such an allegation,[5] the rationale behind the rule that we will not consider previously unraised issues becomes readily apparent.

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[5]A "taking" is necessarily concerned with the nature and scope of the property allegedly infringed upon or denied, here the property consists of appellants' federal mining "rights." We note that there are serious questions present concerning these rights, for example, the effect of the addition of the St. Joe to the protected national Wild and Scenic River System (16 U.S.C. § 1274(a)(23); see also the withdrawal of land adjacent to such systems, 16 U.S.C. § 1279 and the effect of such classification on mining, 16 U.S.C. § 1280); an apparent previous withdrawal of much of the area here under consideration from mining appropriation pursuant to a "streamside zone" withdrawal order (Department of Interior, Public Land Order 4716, October 10, 1969, at 34 Fed.Reg. 16622-23, October 17, 1969); and myriad factual problems inherently present in such condemnation actions.

The appellants next assign as error the district court's imposition of a "lien" upon their machinery and claims in order to secure the costs of preparing the restoration plan and possibly the costs of restoration itself should appellants fail to restore pursuant to the court's order. While the district court may have confused the issue here by the manner in which it imposed and the way it characterized the "lien," a review of the record indicates that the original imposition of the encumbrance upon the appellants' claims and the later modification to also include the appellants' machinery, was meant to secure the costs to be incurred by the state under the act and the court's orders. This action in effect replaced the security ordinarily assured by the statutory requirement for a bond. See I.C. § 47-1317. The original "lien" was but the functional equivalent of the statutory bond. Furthermore, it is our conclusion that such action was within the inherent power of the court to insure compliance with not only the intent of the statute but also its own related orders. See I.C. § 1-1603.

The imposition of the lien and the additional encumbering of the machinery is also justified in respect to the present appeal taken from the district court's order enjoining the appellants' activities. I.R.C.P. 62(c) grants the court the power to grant, suspend or modify an injunction during the pendency of an appeal upon imposition of sufficient security through bonds or other means to preserve the subject matter of the litigation and the rights of the parties. 7 Moore's Federal Practice

¶ 62.05 (1979), in regard to the comparable federal rule, states

> "Rule 62(c) is merely expressive of a power inherent in the court to preserve the status quo where, in its sound discretion, the court deems the circumstances so justify."

Given this recognized power, expressly referred to by the district court below, we find no abuse of discretion in the court's actions in this regard.[6]

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[6]Though not raised by the parties, the arguable application of I.R.C.P. 54(d)(4) should be mentioned. This rule prohibits a cost bond being required of a party by reason of the fact that he is not a resident of the state. The action of the court here was primarily and essentially concerned with a means of achieving the protection contemplated by the bonding provisions of the Dredge and Placer Mining Protection Act and maintaining the status quo while the matter was appealed. While the state expressed the concern that there was little security due to the out of state residency of the members of this mining partnership, in our view the court's action was not "by reason of the fact" that appellants were non-residents but rather due to the court's attempt to achieve both the results contemplated by the act and compliance with its own orders. The prohibition of I.R.C.P. 54(d)(4) is inapplicable to the instant situation.

Lastly, the appellants argue that the awarding of attorney fees to the state pursuant to the contempt finding against one of the appellants was improper. The argument notes that I.C. § 7-601(5) makes the violation of a lawful order of the court a contempt; they argue that the injunction violated by the appellant here was not such a "lawful order" since it itself violated the preemption clause, was negated by the 1977 amendment, and so on. Each of the proferred reasons for the injunction being something other than a lawful order has been found wanting, supra. The injunction being valid and "lawful," its violation was therefore grounds for contempt. I.C. § 7-601, I.C. §§ 1-1901, 1902. The appellants do not make any other arguments in regard to the award of attorney fees; therefore the award of fees, an action within the sound discretion of the district court, will not be disturbed here.

The order of the district court is affirmed. Costs to respondent.

BAKES, C.J. BISTLINE, DONALDSON and SHEPARD, JJ., concur.

IN THE SUPREME COURT
OF THE STATE OF IDAHO

No. 13057

STATE OF IDAHO, et al,

Plaintiffs-Respondents,

v.

JAMES CLICK, SR., et al,

Defendants-Appellants.

Entered: August 17, 1981

GENTLEMEN:

In the above entitled cause the Court has today denied Appellants' Petition for Rehearing.

/s/ Judy E. Cizmich
Deputy Clerk of the
Supreme Court
State of Idaho

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

Case No. 17120

STATE OF IDAHO, ex rel. JOHN V. EVANS, Governor, PETE T. CENARRUSA, Secretary of State; WAYNE L. KIDWELL, Attorney General; ROY E. TRUBY, Superintendent of Public Instruction; and JOE R. WILLIAMS, Auditor, as the State Board of Land Commissioners, GORDON C. TROMBLEY, Superintendent of Public Lands, and the IDAHO STATE BOARD OF HEALTH,

Plaintiffs,

vs.

JAMES CLICK, SR.; EUGENE B. WEISS; and ORRAL LAKE, individually, and as a mining partnership,

Defendants.

ORDER

A hearing having been held on the restoration plan prepared by the plaintiff on the Kismet group of Placer Minier Claims the subject of this action, and it appearing to the court that the plan is appropriate.

IT IS HEREBY ORDERED, that the restoration plan filed by the plaintiff be and the same is hereby approved.

Defendants having moved for a stay of proceedings pending the appeal and consisering the length of time that this case has been in litigation and appeal once having been taken, and it clearly appearing that the defendants had not at the time of the hearing ever filed an application for a permit and good cause appearing thereof.

IT IS HEREBY ORDERED, that the motion for a Stay Order to modify the Order of this court entered January 23, 1979, be and the same is hereby denied.

DATED in Wallace, Idaho this 1st day of October, 1979.

/s/ James G. Towles
District Judge

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

Case No. 17120

STATE OF IDAHO, ex rel. JOHN V. EVANS, Governor, PETE T. CENARRUSA, Secretary of State; WAYNE L. KIDWELL, Attorney General; ROY E. TRUBY, Superintendent of Public Instruction; and JOE R. WILLIAMS, Auditor, as the State Board of Land Commissioners, GORDON C. TROMBLEY, Superintendent of Public Lands, and the IDAHO STATE BOARD OF HEALTH,

Plaintiffs,

vs.

JAMES CLICK, SR.; EUGENE B. WEISS; and ORRAL LAKE, individually, and as a mining partnership,

Defendants.

ORDER

Pursuant to a hearing held September 25th, 1978, on defendants' Motion for a Stay of this Court's Memorandum Decision and Order entered July 7th, 1978, pending appeal and plaintiffs' Motion to Compel Answers to Interroga-

tories and defendants' Motion to Strike an Objection to Memorandum of Costs;

And it further appearing that by Order dated August 16th, 1978, a Temporary Stay Order had been entered pending the hearing herein, and good cause appearing therefore;

IT IS HEREBY ORDERED, that this Order shall supercede the Order entered August 16th, 1978, temporarily staying certain portions of the Order of this Court entered July 7th, 1978.

IT IS HEREBY ORDERED, that the Order of this Court dated July 7th, 1978, be stayed only pending appeal in the following respects only.

1. That the provisions of said Order requiring the restoration of the land shall be stayed until July 1st, 1979.

2. The lien provided in said Order to secure the costs of the restoration plan shall be extended to include not only the mining claims themselves but any and all machinery owned by the defendants and located on the mining claims in question.

3. That defendants shall not remove the machinery owned by them and located on the Kismet mining claims without the prior Order of this Court.

4. That the Special Master appointed by the Court complete the preparation of its restoration plan for the Kismet mining claims, file the same with this Court and serve the same on the defendants. When such plan has been filed and served, either party may notice the same for hearing regarding this Court's approval of said plan.

IT IS FURTHER ORDERED, that consideration of the question of costs and defendants' objection shall be deferred pending further proceedings and a decision on plaintiffs' Motion to Compel Answers to Interrogatories shall be deferred pending receipt of the Memorandum of Law regarding the jurisdiction of this Court to consider such motion after perfection of defendants' appeal to the Supreme Court.

Dated at Wallace, Idaho, this 23rd day of January, 1979.

/s/ James G. Towles
District Judge

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

Case No. 17120

STATE OF IDAHO, ex rel. JOHN V. EVANS, Governor, PETE T. CENARRUSA, Secretary of State; WAYNE L. KIDWELL, Attorney General; ROY E. TRUBY, Superintendent of Public Instruction; and JOE R. WILLIAMS, Auditor, as the State Board of Land Commissioners, GORDON C. TROMBLEY, Superintendent of Public Lands, and the IDAHO STATE BOARD OF HEALTH,

Plaintiffs,

vs.

JAMES CLICK, SR.; EUGENE B. WEISS; and ORRAL LAKE, individually, and as a mining partnership,

Defendants.

MEMORANDUM DECISION AND ORDER

Plaintiffs have made application for a permanent injunction to restrain placer mining operations on the Kismet group of claims and to cause restoration of the area in accordance with the provisions of Idaho Code Section 47-1324.

The evidence showed that defendants had stripped the vegetation from about five acres of land on the mining claims; had changed the channel of Sherlock Creek and built a dike along the new channel and dug at least three ponds on the mining claims preparatory to commencing actual dredging operations; and had installed a dredge on the claims capable of moving more than two cubic yards of earth material per hour. The evidence further showed that no permit had ever been applied for or issued by the Department of Lands under the provisions of Title 47, Chapter 13 of the Idaho Code.

On the other hand, the evidence showed that the claims were valid, unpatented placer mining claims located on federal public domain and that no significant amount of minerals had been recovered, other than the incidental recovery of valuable minerals in testing operations and performance of annual assessment work.

This case has a rather extensive history, having been appealed once to the Supreme Court on the District Court's decision that the act did not apply to unpatented mining claims located on public domain.

In the case of State vs. Click, 97 Id. 791 the Supreme Court reversed that decision and held, in effect, that it was a valid exercise of the police power of the state to impose more stringent regulations than were required under the Federal Mining Act, and hence, the power of Congress was not invaded by the re-

quirement for a permit and the state law requiring restoration of the land.

Idaho Code Section 47-1313 provides

> "For the purposes of this act dredge or other placer mining means any dredge or other placer mining operations to recover minerals with the use of a dredge boat or sluice washing plant whether fed by bucket line as a part of such dredge or by separate dragline or other method capable of moving more than two (2) cubic yards of earth material per hour." (Emphasis supplied)

At the outset it must be determined whether or not up to this point defendants have been conducting dredge or placer mining operations. They contend that to date their operations have only been preparatory to dredge or placer mining operations and in the performance of annual assessment work.

While in the technical sense it may well be argued that dredge or placer mining operations do not actually commence until such time as the operator removes minerals, it would appear that the legislative intent as expressed in the act clearly precludes the disturbance of the surface ground leading to the commencement of dredge or placer mining operations without a permit. Any other interpretation would permit a dredge operator to disturb the surface

of the ground over a large area, change stream channels and otherwise seriously disrupt water quality and destroy the surface resources with impunity.

Also the same acts would be prohibited even though they may be considered as the performance of annual assessment work if a significant amount of surface vegetation was destroyed or a significant amount of the surface of the ground was disturbed.

The evidence clearly indicated in this case that much more than a significant amount of ground had been disturbed and vegetative resources destroyed under the guise of preparation for placer mining operations and performance of annual assessment work.

Idaho Code Section 47-1324 provides in part as follows:

> "The state board of land commissioners may maintain an action in the name of the state of Idaho to enjoin any person, firm or corporation from operating or maintaining a dredge or placer mine without holding a valid permit therefore as provided in this act . . . The Court, or a Judge thereof at chambers, if satisfied from such complaint or by affidavits that the alleged acts have been or are being committed, may issue a temporary restraining order, without notice or bond, enjoining the defendant, his agents and employees, from operating or maintaining

such dredge or placer mine without obtaining a permit as provided in this act and without complying with the other provisions of this act. Upon showing of good cause therefore, the temporary restraining order may require the defendant to make restoration of the mined area in conformity with section 47-1314, Idaho Code, pending final disposition of the action. The action shall proceed as in other cases for injunctions. If at the trial the operation and maintenance of a dredge or placer mine without a permit be established, and the Court further finds that it is probable that the defendant will continue therein or in similar violations, the Court shall enter a decree perpetually enjoining said defendant, his agents and employees from thereafter committing said or similar actions in violation of this act."

Idaho Code Section 47-1314 referred to in the preceeding statute provides as follows:

"Where any person, firm, or corporation conducts a dredge or other placer mining operation on lands and beds of streams in the state of Idaho, it is hereby required that the ground disturbed thereby shall be by such operator leveled and smoothed over reasonably comparable with the natural contour of the ground prior to such disturbance, and to a condition conducive to the growth of verdure, and any watercourse disturbed by such dredging shall be by such operator replaced on meander lines with

pool structure conducive to good fish and wildlife habitat and recreational use. Whenever a dredging or other placer operation results in the substantial removal of topsoil, as determined by the state land board, the operator shall be required to restore the land to its original condition, by the addition of topsoil and the planting of grass, trees and other vegetation, insofar as is reasonably possible after the conclusion of the dredging operation."

The evidence indicated at the time of the trial that defendants had not filed any operating plan with the United States Forest Service, nor had the Forest Service issued any permit under its regulations, and that the only conclusion that can be reached is that it is probable that the defendants will continue to prospect or develope said claims without a permit and to perform assessment work involving the disturbance of the ground, all in violation of this act.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, That the defendants be and they are hereby restrained perpetually from conducting any further assessment work or work in development, prospecting or dredge or placer mining or wherein the surface of the ground or surface vegetation is altered or destroyed without obtaining a valid permit from the plaintiffs herein. The terms of this injunction shall not apply to the restoration of the land as provided hereinafter.

IT IS FURTHER ORDERED, That the ground

heretofore disturbed by defendants' operations shall be by such operator leveled and smoothed over reasonably comparable with the natural contour of the ground prior to such disturbance, and to a condition conducive to growth of verdure. And Sherlock Creek shall be replaced on meander lines with pool structure conducive to good fish and wildlife habitat and recreational use.

IT IS FURTHER ORDERED, That the prior operations of defendant having resulted in the substantial removal of topsoil that the defendants restore the land to its original condition in so far as is reasonably possible by the addition of topsoil and the planting of grass, trees and other vegetation.

IT IS FURTHER ORDERED, That the director of the Department of Lands of the State of Idaho be and he is hereby appointed a special master of the Court to oversee the restoration heretofore provided for, and that such director prepare a specific plan for such restoration defining the location of the stream, the amount of topsoil necessary for restoration, the amount of grass or other vegetation necessary and the number of seedling trees to be installed and their location.

IT IS FURTHER ORDERED, That the restoration work be commenced immediately upon the delivery of the restoration plan and to be completed within a period of sixty (60) calendar days thereafter; that a copy of such plan be deposited with the Court and that in the event the defendants fail to comply with said plan

within the time limited that the plaintiffs may then proceed to effectuate said plan, the cost of which shall constitute a lien upon the property including the costs of preparation of the plan.

IT IS FURTHER ORDERED, That the failure of the defendants to comply with this mandatory injunction may be enforced as other injunctions in addition to the specific requirements hereof and subject to the penalty provided by law.

IT IS FURTHER ORDERED, That costs of these proceedings shall be awarded the plaintiffs.

DATED in Wallace, Idaho this 7th day of July, 1978.

/s/ James G. Towles
District Judge

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

Case No. 17120

STATE OF IDAHO, ex rel CECIL D. ANDRUS, Governor; PETE T. CENARRUSA, Secretary of State; W. ANTHONY PARK, Attorney General; DELMER F. ENGELKING, Superintendent of Public Instruction; JOE R. WILLIAMS, Auditor, as State Board of Land Commissioners; and IDAHO STATE BOARD OF HEALTH,

Plaintiffs,

vs.

JAMES CLICK, SR., EUGENE B. WEISS, and ORRAL LAKE, Individually and as a mining partnership,

Defendants.

STIPULATION

The parties Stipulation dated August 22, 1973, and filed with the Shoshone County District Court in Civil No. 17120 August 28, 1973 provides in pertinent part:

"This Stipulation is executed by and between Plaintiffs and Defendants in the

above entitled action by and through their counsel of record, for the purpose of resolving procedural issues and establishing certain facts and contentions with regard to the above entitled action.

I

"Defendants, and each of them, are citizens and residents of the State of Montana, doing business in the State of Idaho as a mining partnership as defined in Title 53, Chapter 4, Idaho Code, as hereinafter more particularly described.

II

"Defendants have filed certain valid placer mining claims known and designated as Kismet Claims Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 upon the federal public domain within the Saint Joe National Forest, more particularly described as the N 1/2 of Section 14, the S 1/2 of Section 15, NE 1/4 of Section 20, the N 1/2 of Section 21, and the NW 1/4 of Section 22, all in Township 43 North, Range 10 East, Boise Meridian, Shoshone County, State of Idaho.

III

"Defendants are conducting a placer mining operation in and upon the land described in paragraph II of this Stipulation, at a point adjacent to Sherlock Creek, a tributary of the Saint Joe River and upstream

along Sherlock Creek approximately 1 1/8 miles from its confluence with the Saint Joe River, both water courses being located within the State of Idaho. Sherlock Creek is a non-navigable stream in the federal sense, but the Saint Joe River is a navigable river. Defendants have operated and unless enjoined by this Court, intend to operate a sluice washing plant fed by a dragline capable of moving more than two (2) cubic yards of earth material per hour within the said S 1/2 of Section 15, Township 43 North, Range 10 East, Boise Meridian, Shoshone County, Idaho.

IV

"In conducting said dredge mining operation Defendants have removed overburden and topsoil in said area, including growth of native grass, brush and Alpine species of growing trees of a size not exceeding 7 inches breast-high diameter. At the confluence of Sherlock Creek and Heller Creek in said area, Defendants diverted Sherlock Creek from its natural channel by changing the natural meanders of said creek with the use of bulldozer so as to confine said creek to a straight course. In operating said dragline equipment, Defendants have excavated a pit 90 feet in length, 30 feet in width and not less than eight feet in depth.

V

"Defendants do not hold a permit from

the Idaho State Land Commissioner to conduct a placer mining operation upon the land in question. Defendants have never made application for any such permit to the Idaho State Land Commissioner for the lands described above nor have they paid nor tendered the $50.00 application fee required to accompany such an application for a placer mining permit. Defendants have not furnished nor tendered any surety bond in the amount of $10,000.00 to assure their compliance with the Idaho Dredge and Placer Mining Protection Act, Title 47, Chapter 13, Idaho Code.

VI

"Plaintiff hereby withdraws its 'Motion for Substitution of Party As Plaintiff' dated May 7, 1973, and heretofore filed. It is hereby stipulated that the Idaho State Board of Health shall be removed as a party plaintiff, and that Count II of Plaintiff's Complaint may be dismissed.

VII

"The mining operation of the Defendants which is the subject of this action is conducted wholly upon the federal public domain, upon valid unpatented mining claims.

VIII

"It is stipulated and agreed that the following issues of law are presented:

"(1) Does enforcement of the rules and regulations of the Idaho State Board of Environmental and Community Services and the provisions of Chapter 1, Title 39, Idaho Code, and the provisions of Title 47, Chapter 13, Idaho Code, (Idaho Dredge and Placer Mining Protection Act) against the operation of Defendants' mining operation constitute an interference with the power of Congress to dispose of and make all needful rules and regulations respecting property belonging to the United States under Article 1, Section 8 and Article 4, Section 3 of the United States Constitution?

. . ." (Cl. Tr. p. 44 - Click I Appeal)

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

Case No. 17120

STATE OF IDAHO, ex rel CECIL D. ANDRUS, Governor; PETE T. CENARRUSA, Secretary of State; W. ANTHONY PARK, Attorney General; DELMER F. ENGELKING, Superintendent of Public Instruction; JOE R. WILLIAMS, Auditor, as State Board of Land Commissioners; and IDAHO STATE BOARD OF HEALTH,

Plaintiffs,

vs.

JAMES CLICK, SR., EUGENE B. WEISS, and ORRAL LAKE, Individually and as a mining partnership,

Defendants.

ANSWER

The Answer filed by Petitioners, Civil No. 17120, Shoshone County District Court, February 5, 1973, provides in pertinent part:

"COME NOW Defendants and answer Plaintiffs' complaint as follows:

. . .

"SECOND DEFENSE

"The Idaho Dredge and Placer Mining Protection Act, Idaho Code, Title 47, Chapter 13, as applied to defendants' mining operations located on their Kismet Claims, Nos. 1-11, inclusive, Shoshone County, Idaho, violates the constitutions of Idaho and the United States and is void.

. . .

"COUNTERCLAIM

"For their counterclaim defendants allege:

. . .

VIII

"That insofar as the Idaho Dredge and Placer Mining Protection Act authorizes the plaintiffs to regulate and prevent defendants placer mining operations on said claims, said Act is unconstitutional and void in that:

a. It constitutes an intereference with the power of Congress to dispose of and make all needful rules and regulations respecting property belonging to the United States under Article 1, Section 8 and Article 4, Section 3 of the United States Constitution;

. . .

"WHEREFORE, Defendants pray for a Declaratory Judgment adjudging and decreeing that the provisions of the Idaho Dredge and Placer Mining Protection Act do not authorize the Plaintiffs to regulate, prevent or otherwise interfere with Defendants' placer mining operations located on their said Kismet Claims or, in the alternative, that if said Act does authorize such interference it is unconstitutional, void and without force of law; . . ."
(Cl. Tr. p. 31 - Click I Appeal)

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

Case No. 17120

STATE OF IDAHO, ex rel CECIL D. ANDRUS, Governor; PETE T. CENARRUSA, Secretary of State; W. ANTHONY PARK, Attorney General; DELMER F. ENGELKING, Superintendent of Public Instruction; JOE R. WILLIAMS, Auditor, as State Board of Land Commissioners; and IDAHO STATE BOARD OF HEALTH,

Plaintiffs,

vs.

JAMES CLICK, SR., EUGENE B. WEISS, and ORRAL LAKE, Individually and as a mining partnership,

Defendants.

MEMORANDUM DECISION
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

The Memorandum Decision, Findings of Fact, Conclusions of Law, and Order entered by the Shoshone County District Court in Civil No. 17120 filed March 5, 1975 provides in pertinent part:

"This matter was tried January 24, 1974 and the briefing of the parties has finally been completed and filed with the court.

"Defendants are the owners of certain valid unpatented placer mining claims known as the Kismet Numbers 1 through 11, located on Sherlock Creek near the Idaho-Montana border, which creek is a tributary of the St. Joe River.

"The parties entered into a stipulation of facts and testimony and exhibits were introduced in evidence, including depositions.

"From the foregoing, it appears that Sherlock Creek is a non-navigable stream and that the placer claims in question are valid, existing, unpatented claims. . . .

"It further appears that the only act in question here is the Dredge Mining Act and that the Idaho Stream Channel Protection Act and others are not involved.

"Defendants contend that said act, either in whole or in part, is unconstitutional and void and requests the court to enter a declaratory judgment to the effect that defendants' operation is not subject to regulation or prohibition by the plaintiffs herein, and the specific contentions will be discussed hereinafter.

"Defendants first contention is that the Idaho Dredge Mining Act conflicts with the

federal mining laws and, as such, is unenforceable. . . ." (Cl. Tr. p. 63 - Click I Appeal)

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

Case No. 17120

STATE OF IDAHO, ex rel. JOHN V. EVANS, Governor; PETE T. CENARRUSA, Secretary of State; WAYNE L. KIDWELL, Attorney General; ROY E. TRUBY, Superintendent of Public Instruction; and JOE R. WILLIAMS, Auditor, as the State Board of Land Commissioners; GORDON C. TROMBLEY, Superintendent of Public Lands, and the IDAHO STATE BOARD OF HEALTH,

Plaintiffs,

vs.

JAMES CLICK, SR.; EUGE B. WEISS; and ORRAL LAKE, individually and as a mining partnership,

Defendants.

PRE-HEARING MEMORANDUM

The Petitioners' Pre-Hearing Memorandum dated May 3, 1978 and filed with the District Court in Civil No. 17120 provides in pertinent part:

"In this case Plaintiffs request that this Court enjoin Defendants from conducting any mining operations on their Kismet Claims and either require that Defendants restore the mined area of their claims or pay the cost of such restoration. Since this Court entered its Decree in this case two events have occurred which bear upon the legal issues involved. First, the Supreme Court entered its decision September 24, 1976 reversing this Court's judgment. Second, in 1977, the Idaho State Legislature amended Idaho Code, Section 47-1323 to expressly prohibit "dredge mining in any form" on a tributary of the St. Joe River. . . .

"In its decision in this case, the Idaho Supreme Court recognized certain principles which govern interpretation and enforcement of the Idaho Dredge and Placer Mining Protection Act. These principles were formulated by the Court in order to avoid direct conflict between the Act and federal law. In formulating these principles, the Court recognized the rights granted to Defendants under federal law:

. . .

It seems clear from the foregoing that this Court should not interpret or enforce the provisions of the Act in a manner that would render it impossible for Defendants to exercise those rights specifically granted by the federal legislation.

"In its decision, the Supreme Court referred to 30 U.S.C., Section 612. That section provides:

. . .

This section recognizes the miner's right to utilize the surface resources of his claim for prospecting, mining or processing operations and uses reasonably incident thereto for the construction of buildings or structures in connection therewith, or to provide clearance for such operations or uses, even as against the Forest Service who has the delegated authority to administer surface resources within the national forest.

"If this Court were to grant Plaintiffs' request and issue a mandatory injunction requiring Defendants to restore the surface of their claims, at this time, it would be impossible for Defendants to exercise those rights specifically granted by the Federal Mining Law and recognized by the Idaho Supreme Court. . . .

"On March 18, 1977 the Idaho Legislature amended Idaho Code Section 47-1323 to expressly prohibit "dredge mining in any form" on the St. Joe River, including tributaries thereof. This Court is fully aware that weather conditions do not permit placer mining on Defendants' claims during the winter months. After the Legislature's amendment to Section 47-1323 Defendants were legally prohibited from dredge mining

in any form on their claims. Likewise, Plaintiffs were legally prohibited from issuing a permit authorizing dredge mining on their claims. It would have been, and is now, a totally meaningless exercise for Defendants to apply for a permit under the Act. Under the circumstances it would be grossly inequitable for this Court to order immediate restoration of Defendants' claims as a punishment for Defendants' failure to perform an act which the law prohibits.

. . ." (Cl. Tr. p. 11 - Click II Appeal)

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

Case No. 17120

STATE OF IDAHO, ex rel. JOHN V. EVANS, Governor; PETE T. CENARRUSA, Secretary of State; WAYNE L. KIDWELL, Attorney General; ROY E. TRUBY, Superintendent of Public Instruction; and JOE R. WILLIAMS, Auditor, as the State Board of Land Commissioners, GORDON C. TROMBLEY, Superintendent of Public Lands, and the IDAHO STATE BOARD OF HEALTH,

Plaintiffs,

vs.

JAMES CLICK, SR.; EUGENE B. WEISS; and ORRAL LAKE, individually and as a mining partnership,

Defendants.

POST TRIAL MEMORANDUM

Petitioners' Post Trial Memorandum filed with the District Court May 23, 1978 in Civil No. 17120 provides in pertinent part:

". . .

"Immediate restoration, as a remedy in this proceeding, is inappropriate because, as discussed above, it is only applicable with respect to the temporary restraining order issued prior to trial and pending final disposition of the action. Even if such remedy were appropriate and the acts of restoration sufficiently defined, this Court should not grant such relief because it would result in a 'direct collision between state and federal legislation'. (97 Idaho 796) Presumably, the restoration contemplated by plaintiffs involves some type of topsoil redistribution and revegetation. Federal legislation specifically grants to claimants the right to sever and remove all vegetative or other surface resources from their claims in order to clear them for prospecting, mining or processing operations. 30 U.S.C., Section 612. Again, if plaintiffs are requesting that this Court order defendants to reroute Sherlock Creek in a meandering course through the mining area of their claims, a direct collision results between the State act and 30 U.S.C., Section 612. If the Act is interpreted as plaintiffs request, it is in direct conflict with federal legislation and inapplicable to defendants' claims by reason of the supreclause, United States Constitution, Art. VI, Clause 2 (97 Idaho 796)

. . .

". . .Plaintiffs further argue that Section 47-1317(h) permits the State Land

Board to prohibit mining for any reason, concluding that this section had been upheld by the Supreme Court. The Supreme Court did not hold that the Land Board could prohibit mining on defendants' claims for any reason. In fact it specifically stated that such prohibition would constitute a taking of defendants' property. The Court merely stated that Section 47-1317(h) did not on its face prohibit such mining. Plaintiffs overlook the fact that defendants' mining claims are located on federal public domain and that the federal government has determined that the proper use of such property is for mining purposes. Any determination of defendants' application for permit by the Land Board would have to recognize the federal government's preemptory decision that mining on defendants' claims is in the public interest. Recognition of this fact is explicit in the regulations adopted by the Forest Service. In the Forest Service Manual, Interim Directive No. 5, dated June 14, 1977, a copy of which is attached hereto as Exhibit "A", the Forest Service recognizes that prospecting and mining within a national forest is a statutory right under federal law and not a mere privilege.

. . ." (Cl. Tr. p. 55 - Click II Appeal)

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

Case No. 17120

STATE OF IDAHO, ex rel. JOHN V. EVANS, Governor; PETE T. CENARRUSA, Secretary of State; WAYNE L. KIDWELL, Attorney General; ROY E. TRUBY, Superintendent of Public Instruction; and JOE R. WILLIAMS, Auditor, as the State Board of Land Commissioners, GORDON C. TROMBLEY, Superintendent of Public Lands, and the IDAHO STATE BOARD OF HEALTH,

Plaintiffs,

vs.

JAMES CLICK, SR.; EUGENE B. WEISS; and ORRAL LAKE, individually and as a mining partnership,

Defendants.

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR INJUNCTION

Petitioners' Memorandum in Opposition to Plaintiffs' Motion for Injunction filed with the Shoshone County District Court in Case No. 17120, 1978, provides in pertinent part:

". . .

"Moreover, the requested prohibition against any further clearing of vegetation from the surface of the defendant's claims would render it impossible for defendants to carry on their mining operations. It is clear from the Supreme Court's decision, that this court should not construe the Dredge Mining Act in a manner which would make it impossible for defendants to conduct their mining operations. The Supreme Court's decision that the Act was not preempted by federal law is premised upon the absence of direct conflict between the requirements of the act and the rights granted under the Federal Mining Law. As the Supreme Court pointed out:

> 'In addition, the locator is granted the right to remove surface vegetation and to cut timber as may be necessary for mining purposes as well as to appropriate needed water. 30 USC Sec. 612; see also 54 Am. Jur. 2d, Mines and Minerals, Sec. 57 (1971).'

"The affidavit of Max Von Weiss shows that plaintiffs object to and seek to enjoin the construction of flood and pollution control structures and the removal of overburden in satisfaction of defendants' annual assessment work requirement. Again, the Supreme Court's mandate should be kept

in mind:

> 'On the other hand, where a right is granted by the federal legislation, state regulation which rendered it impossible to exercise that right would be in conflict.'

"Immediately after the Supreme Court entered its decision in this case, the Idaho legislature amended Section 47-1323 to expressly prohibit 'dredge mining in any form' on Sherlock Creek (being a tributary of the St. Joe River). This amendment to the Idaho Dredge Mining Act was in response to the Supreme Court's decision:

> 'There is no question that the possession of a valid placer claim is a valuable property right. State v. Finch, 79 Idaho 275, 315 P.2d 529 (1957). The problem is whether the state's regulation of this right so cuts down its value as to require compensation to be made. If the statute prohibited respondents entirely from carrying on their business then clearly this would be a 'taking'. However, we have determined that the statute may not do this.'
>
> . . ."

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

Case No. 17120

STATE OF IDAHO, et al.,

Plaintiffs,

vs.

JAMES CLICK, et al.,

Defendants.

MOTION FOR STAY PENDING APPEAL

Petitioners' Motion for Stay Pending Appeal filed with the Shoshone County District Court July 6, 1979 in Case No. 17120 provides in pertinent part:

". . .

"The reclamation and restoration work provided for in the State's plan would render it impossible for defendants to conduct their dredge mining operation. All of plaintiff's witnesses testified at the prior hearing that the restoration and stream alteration work should not be required in the manner that would materially interfere with the mining of defendants'

claims. Defendants submit that the conflict between the specific restoration work required by the State and their rights under the Federal Mining Law create that 'direct collision between State and Federal legislation' alluded to by the Idaho Supreme Court (97 Idaho 796). This conflict raises a serious preemption question under the United States Constitution which should be resolved by the Idaho Supreme Court prior to commencement of the restoration plan and work, if any is ultimately required. . . ."

IN THE SUPREME COURT
OF THE STATE OF IDAHO

No. 13057

STATE OF IDAHO, et al.,

Plaintiff-Respondent,

vs.

JAMES CLICK, SR., et al.,

Defendants-Appellants.

MOTION FOR STAY OF DISTRICT COURT ORDERS AND OPPOSITION TO PLAINTIFF-RESPONDENT'S REQUEST FOR EXTENSION OF TIME WITHIN WHICH TO FILE REPLY BRIEF

Petitioners' Motion for Stay of District Court Orders and Opposition to Plaintiff-Respondent's Request for Extension of Time Within Which to File Reply Brief filed with the Idaho Supreme Court July 5, 1979, provides in pertinent part:

". . .

"The District Court's orders also require defendants-appellants to alter the present location of Sherlock Creek across

their mining claims and deposit topsoil and plant vegetation on the surface of their mining claims, according to a Plan submitted by the State Department of Lands. Such work was to have been commenced by July 1, 1979. The basis for such requirement was that defendants-appellants had failed to obtain a permit under the Idaho Dredge Mining Act. However, since Idaho Code, Section 47-1323 expressly prohibits 'dredge mining in any form' on the St. Joe River or its tributaries (including Sherlock Creek), defendants-appellants are excused from that requirement. The validity of that prohibition and the unconstitutional taking of defendants-appellants' property which it entails, are the central issues involved in this appeal. Beyond that, the Idaho Dredge Mining Act (Section 47-1314) provides for restoration only 'insofar as is reasonably possible after the conclusion of the dredging operation.' Defendants-appellants have not concluded their dredge mining operation. Each of the State's witnesses at trial testified that the restoration requirements of the Act should not be invoked until after mining and should not be invoked in such a way as to unreasonably interfere with mining. (Tr. pp. 133-136) Clearly, this was the intent of the Act. Any other interpretation would bring the restoration provisions of the Act in direct conflict with the Federal Mining Law (30 U.S.C., Section 612) State of Idaho, et al vs. Click, et al (1976) 97 Idaho 791. This conflict raises a serious preemption question under the United States

Constitution which should be resolved by the Idaho Supreme Court prior to commencement of the Restoration Plan and work, if any is ultimately required. . . ."

IN THE SUPREME COURT
OF THE STATE OF IDAHO

No. 13057

STATE OF IDAHO, ex rel., JOHN V. EVANS, Governor, PETE T. CENARRUSA, Secretary of State; WAYNE L. KIDWELL, Attorney General; ROY E. TRUBY, Superintendent of Public Instruction; and JOE R. WILLIAMS, Auditor, as the State Board of Land Commissioners; GORDON C. TROMBLEY, Superintendent of Public Lands, and the IDAHO STATE BOARD OF HEALTH,

Plaintiff-Respondent

vs.

JAMES CLICK, SR., EUGENE WEISS, and ORRAL LAKE, individually and as a mining partnership,

Defendants-Appellants

BRIEF OF DEFENDANTS-APPELLANTS

Petitioners' Brief filed with the Idaho Supreme Court in this case April 27, 1979 provides in pertinent part:

". . .

I

"FEDERAL PREEMPTION

"It is clear from the record that Appellants have not completed their mining operation on their Kismet Claims and that enforcement of the District Court's Order requiring immediate restoration and revegetation would prevent further mining operations on those claims. (R. 1.2, p. 433-440) In its decision at 97 Idaho 791, this Court recognized certain principles which govern interpretation and enforcement of the Idaho Dredge Mining Act. These principles were formulated by the Court in order to avoid direct conflict between the Act and federal law. In formulating these principles, the Court recognized the rights granted to Appellants under the federal law:

. . .

The Court went on to state:

> 'Where there is a direct collision between state and federal legislation our task is simple, the federal legislation would preempt state legislation by reason of the supremacy clause, U.S. Const., Art. VI Clause 2: Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 231, 928, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963).' (97 Idaho 796)

"This Court concluded that:

> 'We find no such conflict as presented by the provisions of the Idaho Act requiring a permit or the restoration of the land. Neither the requirement of obtaining a permit or of restoring the land render it impossible to exercise rights specifically granted by the federal legislation, although they may make it more difficult. Respondents argue that restoration requirements could render it impossible for them to mine their remaining lode deposits following the termination of their dredge operation. They assert that they will have to re-excavate much of the restored land. Certainly, under the standard enunciated above these provisions of the Idaho Act would be unenforceable to the extent they rendered it impossible to mine the lode deposit. However we find no such impossibility presented on the face of the statute. Indeed, in the present case there was some evidence that lode and dredge operations would be conducted simultaneously.' (97 Idaho 797)

"It seems clear from the foregoing that the Dredge Mining Act should not be interpreted or enforced in a manner that would render it impossible for Appellants to exercise those rights specifically granted by federal mining legislation.

"In its prior decision in this case, this Court referred to 30 U.S.C., Section 612, which is the latest federal statute defining the mining rights with respect to the surface of his claims. . . .

. . .

"This Section recognizes the miner's right to utilize the surface resources of his claim for prospecting, mining, or processing operations and uses reasonably incident thereto for the construction of buildings or structures in connection therewith, or to provide clearance for such operations or uses, even as against the Forest Service who has the delegated authority to administer surface resources within the national forest. The United States Forest Service has, itself, recognized these statutory rights:

> 'The prospector and miner have a statutory right (not a mere privilege) under the 1897 Organic Act to enter upon the national forest for prospecting and mining. Their rights to do this cannot be unreasonably restricted or made excessively burdensome.'
>
> 'Most users of the national forest cannot impact surface resources or secure rights to lands in national forests without express permission. But the prospector and miner has a right, under the laws, to search for and take valuable deposits and locate

> minerals and may, in so doing, secure title to national forest land involved and impact on surface resources incident to such activities, without obtaining permission from the Forest Service.' (Forest Service Manual, Interim Directive No. 5, issued June 14, 1977; Tr. p. 63, 64)

"If the District Court's Order is upheld, it will be impossible for Appellants to exercise those rights specifically granted by the federal mining law and recognized by this Court. To date, Appellants have merely prepared their claims for mining and have not actually commenced dredge operations. To now require them to restore the surface of their claims, thereby obliterating their preparatory clearance work in construction of mining facilities such as dredge ponds and dikes, would be to bring the Act into direct conflict with those rights granted Appellants under the federal law.

. . .

III

"THE 1977 AMENDMENT

". . .

"Subsequent to this Court's decision at 97 Ida. 791 and on March 18, 1977 the Idaho Legislature amended Idaho Code Sec. 47-1323 to expressly prohibit 'dredge mining

in any form' on the St. Joe River, including tributaries thereof. After that amendment Appellants were legally prohibited from dredge mining in any form on their mining claims. Likewise, Respondents were legally prohibited from issuing a permit authorizing dredge mining on those claims. It would have been, and is now, a totally meaningless exercise for Appellants to have applied or be required to apply for a permit under the Dredge Mining Act. Under the circumstances, it was grossly inequitable for the District Court to order immediate restoration of Appellants' mining claims for their failure to perform an act which the law prohibits.

"It is elementary that a party does not have to exhaust administrative remedies where his resort to administrative agency would be futile. Winterberger v. General Teamsters Auto Truck Drivers & Helpers Local Union 162 (CA Ore. 1977), 558 F.2d 929; NLRB v. Industrial Union of Marine and Shipbuilding Workers of America (1968), 391 U.S. 418, 20 L.Ed.2d 706. A party seeking judicial relief does not have to complete administrative procedure before resorting to the court where the administrative agency is powerless to afford relief in the face of the provisions contained in the governing statutes. U.S. vs. Knox, 128 U.S. 230, 32 L.Ed. 465; Montana National Bank v. Yellowstone Co., 276 U.S. 499, 72 L.Ed. 673; Koepke v. Fontecchio (9th Cir.), 177 F.2d 125. . . ."

Opposition

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Case No. 81-912

In The

Supreme Court of the United States

October Term 1981

JAMES CLICK, SR., EUGENE WEISS and ORRAL LAKE,

Petitioners,

vs.

STATE OF IDAHO, EX REL. JOHN V. EVANS, GOVERNOR; PETE T. CENARRUSA, SECRETARY OF STATE; WAYNE L. KIDWELL, ATTORNEY GENERAL; ROY E. TRUBY, SUPERINTENDENT OF PUBLIC INSTRUCTION; JOE R. WILLIAMS, AUDITOR, as the STATE BOARD OF LAND COMMISSIONERS; GORDON C. TROMBLEY, SUPERINTENDENT OF PUBLIC LANDS, and the IDAHO STATE BOARD OF HEALTH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a party who fails to appeal a final determination of an issue is estopped from relitigating that issue.

2. Whether a state statute requiring a permit, bond, and restoration plan for dredge mining activities on unpatented federal land is preempted by federal mining legislation.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents agree to the substance of petitioners' statement of the case, with the following clarifications.

Petitioners have never applied for or been issued a permit and have never submitted a bond or operating plan as required by the Idaho Dredge and Placer Mining Protection Act (hereinafter the Dredge Mining Act). Peti-

tioners have never submitted an operating plan or bond as required by federal regulations, as a result of which they were and currently are enjoined from mining by order of the United States District Court for the District of Idaho. This injunction was upheld by the Ninth Circuit in *United States v. Weiss*, 642 F. 2d 296 (9th Cir. 1981).

The only issue examined in the state district court decision of March 5, 1975, was the constitutionality of the Dredge Mining Act (Cl. Tr., p. 53)[1]. On appeal, the Idaho Supreme Court upheld the constitutionality of the Act in *State Ex Rel. Andrus v. Click*, 97 Idaho 791, 554 P. 2d 969 (1976) (hereinfter *Click I*) (App. 1), and it remanded the case to the state district court for enforcement of its decision. The district court, on remand, refused to consider the constitutionality of a 1977 amendment to the Dredge Mining Act (hereinafter 1977 amendment) on the ground that petitioners had not been denied a permit on the basis of the amendment (Rptr. Tr., pp. 22-26, 226). In *State Ex Rel. Evans v. Click*, — Idaho —, 631 P. 2d 614 (1981) (hereinafter *Click II*), the Idaho Supreme Court did not consider the effect of the 1977 amendment on the grounds that it had not been an issue below, was the subject of another action pending, and was immaterial. 631 P. 2d at 620. The issue of whether the 1977 amendment constitutes a taking remains pending before the First Judicial District Court, Shoshone County (No. 21217).

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[1]"Cl. Tr." refers to clerk's transcript on appeal to the Idaho Supreme Court, Sept. 4, 1975. "Rptr. Tr." refers to reporter's transcript on appeal to the Idaho Supreme Court, No. 13057. "Tr." refers to transcript of hearing before the state district court, January 24, 1974.

Expert testimony at trial indicated that state restoration requirements are not unreasonable (Rptr. Tr., p. 135) and that as a common practice reclamation is an integral part of most mining operations (Rptr. Tr., pp. 154, 159, 162). Federal officials cooperate closely with state agencies in regulating dredge mining (Tr., p. 132) and coordinate their enforcement with that of the state under the Dredge Mining Act (Tr., pp. 192, 195).

The findings of the Idaho Supreme Court were supported by the record.

SUMMARY OF ARGUMENT

The Idaho Supreme Court made a final determination as to the constitutionality of the Dredge Mining Act in *Click I*. Petitioners did not appeal that decision. Petitioners are thus estopped from raising this issue now.

The issue of whether the 1977 amendment conflicts with federal legislation is not properly before the Court. The issue was not decided by the Idaho Supreme Court. The amendment is the subject of a pending state action. Petitioners were not injured by the amendment.

The constitutionality of the Dredge Mining Act was correctly upheld by the Idaho Supreme Court. The act's permit, bond, and restoration requirements do not conflict with federal mining legislation. Federal statutes and regulations expressly acknowledge concurrent state jurisdiction. The field of dredge mining regulation has not been preempted. Authority relied on by petitioners to the contrary is inapposite.

ARGUMENT

1. Petitioners are estopped from raising the issue of whether the Dredge Mining Act is preempted by federal legislation.

Petitioners' argument must rest on the contention that the permit, restoration[2], and bond[3] requirements of the Dredge Mining Act conflict with or are preempted by federal mining legislation. This issue was fully litigated and finally determined in the *Click I* decision of September 24, 1976. Petitioners did not appeal or petition for certiorari as to that decision.

Issues which were actually litigated and determined in a proceeding cannot be relitigated in a later proceeding. *Lawlor v. National Screen Service Corp.*, 349 U. S. 322, 326, 75 S. Ct. 865, 99 L. Ed. 1122 (1955); *Commissioner v. Sunnen*, 333 U. S. 591, 598, 68 S. Ct. 715, 92 L. Ed. 898 (1948); *United States v. Truckee-Carson*, 649 F. 2d 1286, 1302 fn. 11 (9th Cir. 1981). This doctrine, collateral estoppel, applies even where the cause of action in the second proceeding is different from that in the first. *Lawlor*,

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[2]The district court's requirement that Sherlock Creek be relocated was part of the restoration plan approved by the district court. Such relocation is not per se required by the Dredge Mining Act. Here it was made necessary because petitioners unlawfully altered the stream's natural channel (Cl. Tr., p. 45).

[3]The Idaho Supreme Court found the imposition of a lien to secure the cost of restoration to be the functional equivalent of the statutory bond usually posted for a mining operation and within the district court's inherent powers in enforcing the Dredge Mining Act. 631 P. 2d at 620-621. This interpretation does not present a federal question. Petitioners' challenge to the lien should be treated as a challenge to the bond requirement.

supra at 326. The judgment to which it is applied must be final. A judgment based on an agreed statement of facts is considered final as to issues decided on those facts. See *Fairmont Aluminum Co. v. Commissioner of Internal Revenue*, 222 F. 2d 622, 625 (4th Cir. 1955).

Where a litigant fails to appeal a state Supreme Court decision involving the constitutionality of a state statute to the U. S. Supreme Court, he is barred from raising the same issue again. *Angel v. Bullington*, 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 832 (1946). In *Angel v. Bullington*, the Court stated:

> If a litigant chooses not to continue to assert his rights after an intermediate tribunal [here, the North Carolina Supreme Court] has decided against him, he has concluded his litigation as effectively as though he had proceeded through the highest tribunal available to him. An adjudication of an issue implies that a man has a chance to win his case. The chance was necessarily afforded by the North Carolina litigation. . . . He forewent his right to have a higher court, this Court, enable him to win his chance by holding that he was right and that the North Carolina Supreme Court was wrong. He cannot begin all over again in an action involving the same issues before another forum in the same State. 330 U. S. at 189-190.

Here, the dispositive decision as to the constitutionality of the Dredge Mining Act was made in *Click I*. That determination was made based upon facts stipulated by the parties. Although the Court in *Click I* remanded the case to the lower court for enforcement of its decision, its ruling as to the constitutionality of the act was final. Petitioners then had the option of appealing the decision to the Supreme Court, but did not. By *Angel v. Bullington*, they are thus barred from relitigating this issue. The

court in *Click II*, while addressing the issue only briefly and expressly relying on the holding in *Click I*, did not specifically rely on collateral estoppel. That does not, however, prevent the Supreme Court from applying the doctrine. An appellate court may sustain a correct judgment on grounds different from those adopted below. *Chinese Am. Civic Council v. Atty. Gen. of U. S.*, 566 F. 2d 321, 326 fn. 12 (D. C. Cir. 1977); *Chambers v. Omaha Public School Dist.*, 536 F. 2d 222, 227 (8th Cir. 1976); *Kithcart v. Metropolitan Life Ins. Co.*, 150 F. 2d 997, 1000-1001 (8th Cir. 1945), cert. den., 326 U. S. 777, 66 S. Ct. 267, 90 L. Ed. 470 (1945). The Supreme Court should deny the petition for certiorari on the ground that petitioners were estopped below.

2. The issue of the effect of the 1977 amendment is not properly before the Court.

Petitioners do not specifically raise this issue in their question presented, but include it in their argument that the Dredge Mining Act prohibits mining under federal legislation. Certiorari as to this issue should be denied for the following reasons.

The constitutionality of the 1977 amendment was not addressed, of course, in either the 1975 district court decision or in *Click I*. It was rejected as an issue in the 1978 district court decision and in *Click II*. Upon appeal from a decision of a state court upholding the constitutionality of a state statute, the Supreme Court will not consider issues not raised or decided in the state court. *University of California Regents v. Bakke*, 438 U. S. 265, 283, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978); *Monks v. New Jersey*, 398 U. S. 71, 71, 90 S. Ct. 1563, 26 L. Ed. 2d 54

(1970); *McGoldrick v. Compagnie Gen. Transatlantique*, 309 U. S. 430, 434, 60 S. Ct. 670, 84 L. Ed. 849 (1940).

The issue of whether the 1977 amendment constitutes a taking is currently pending in and unresolved by the Idaho courts. This aspect of the effect of the 1977 amendment is not ripe for review. *Hudson Distributors v. Lilly and Co.*, 377 U. S. 386, 394, 84 S. Ct. 1273, 12 L. Ed. 2d 394 (1964).

Finally, petitioners' challenge to the 1977 amendment is speculative. The injunction upheld by the Idaho Supreme Court was imposed by the district court for violations of the Dredge Mining Act occurring prior to the 1977 amendment. Petitioners have never applied for a permit and thus have never been denied a permit on the basis of the 1977 amendment. The Supreme Court will not consider the validity of a provision of a statute where the record does not show that the state has attempted to enforce that provision against the complainant. *Huron Portland Cement Co. v. Detroit*, 362 U. S. 440, 441, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960). Petitioners have not suffered concrete injury due to the 1977 amendment. The Supreme Court will not consider abstract or anticipatory questions. *New York City Transit Authority v. Beazer*, 440 U. S. 568, 571, 99 S. Ct. 1355, 59 L. Ed. 2d 587 (1979); *Socialist Labor Party v. Gilligan*, 406 U. S. 583, 586, 589, 92 S. Ct. 1716, 32 L. Ed. 2d 317 (1972); *Rescue Army v. Municipal Court*, 331 U. S. 549, 568, 67 S. Ct. 1409, 91 L. Ed. 1666 (1946).

3. The issue of whether the Dredge Mining Act is preempted by federal legislation was decided correctly by the Idaho Supreme Court.

The Idaho Supreme Court relied on the reasoning in *Click I* to hold that the Dredge Mining Act is not preempted by federal legislation. That holding is correct as a matter of law and is supported by substantial evidence in the record.

Congress possesses plenary power over public lands under the Property Clause. *Kleppe v. New Mexico,* 426 U. S. 529, 539, 96 S. Ct. 2285, 49 L. Ed. 2d 34 (1976). State regulation on public lands is only excluded, however, where it conflicts or is incompatible with federal legislation. See *Kleppe,* supra at 543. "Federal regulation . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Avocado Growers v. Paul,* 373 U. S. 132, 142, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963). Compliance with both federal and state regulations must be a physical impossibility. See *Florida Avocado Growers v. Paul,* supra at 142-143; *Northern States Power Co. v. State of Minnesota,* 447 F. 2d 1143, 1146 (8th Cir. 1971). Even where no direct conflict exists, Congress can preempt state regulation by express declaration. *Campbell v. Hussey,* 368 U. S. 297, 302, 82 S. Ct. 327, 7 L. Ed. 2d 299 (1961).

The Idaho Dredge Mining Act does not conflict with federal mining legislation.[4] There was no evidence that

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[4]Since petitioners made no attempt to comply with the state law, the reasonableness of the law is not at issue. See *United States v. Weiss,* 642 F. 2d 296, 299 fn. 5 (9th Cir. 1981). The only issue is whether the law actually prohibits mining on federal land.

petitioners could not have complied with both federal and state regulations at the same time. Substantial evidence was produced that state permit and restoration requirements do not render it impossible to exercise federal mining rights. Moreover, while some of the state requirements may be more stringent than the federal requirements, this in itself does not amount to an impermissible conflict. See *Florida Avocado*, supra at 141; see also *Northern States*, supra at 1147.

Congress has not expressly or impliedly preempted the field of mining regulation. Indeed, contrary to petitioners' assertion (Pt., p. 25), the federal regulatory scheme contains express acknowledgement of concurrent state jurisdiction and requires compliance with state laws as well as federal laws. The 1872 Mining Law, 17 Stat. 91, 30 U. S. C. 21 et seq., grants mining locators certain rights "so long as they comply with the laws of the United States, and with *state*, territorial, and local regulations not in conflict with the laws of the United States concerning their possessory title. . . ." 30 U. S. C. 26 (emphasis added). Under the Organic Act of 1897, 30 Stat. 35, 16 U. S. C. 551, as amended, the Secretary of Agriculture is authorized, in the administration of the national forests, to cooperate with the states in the enforcement of state laws. 16 U. S. C. 551a. The same act provides the authority for regulations, set forth in 36 C. F. R. 252, governing mining on national forest lands. *United States v. Weiss*, supra at 298. Under those regulations, operators "shall comply with applicable Federal and *State* air quality standards," 36 C. F. R. 252.8(a), "shall comply with applicable *State* water quality standards," 36 C. F. R. 252.8 (b), and "shall comply with applicable Federal and *State*

standards for the disposal and treatment of solid wastes." 36 C. F. R. 252.8 (c) (emphasis added). Most indicative of concurrent jurisdiction is the provision that, "[c]ertification or other approval issued by State agencies or other Federal agencies of compliance with laws and regulations relating to mining operations will be accepted as compliance with similar or parallel requirements of these regulations." 36 C. F. R. 252.8(h).

In addition to congressional acquiescence to concurrent state jurisdiction, the purposes of federal mining legislation and those of the Dredge Mining Act are compatible. The 1872 Mining Law and the Organic Act of 1897 sought, subject to applicable laws, to foster the location and development of mineral resources in the public domain and the national forest. See 30 U. S. C. 26; 16 U. S. C. 478. The regulations promulgated pursuant to the Organic Act of 1897, 36 C. F. R. 252, were "designed to minimize adverse environmental impacts on the surface resources of the national forests." *United States v. Weiss,* supra at 298; 36 C. F. R. 252.1. These federal objectives are paralleled by the policy enunciated in Idaho Code 47-1312 (App. 12). The permit, restoration, and bond requirements of the Dredge Mining Act, while allowing mineral development to go forward, ensure that adverse environmental impacts will be minimized.

The Idaho Supreme Court concluded correctly that Congress has not preempted state regulation of dredge mining. Petitioners' attempt to apply the reasoning of *Ventura County v. Gulf Oil Corp.,* 601 F. 2d 1080 (9th Cir. 1979), aff'd 445 U. S. 947, 100 S. Ct. 1593, 63 L. Ed. 2d 782 (1980), to the statutes and circumstances involved

here is mistaken. *Ventura* involved a federal regulatory scheme more pervasive than the one here and a statute, the Mineral Lands Leasing Act of 1920, not containing the express recognition of concurrent state jurisdiction found in the 1872 Mining Law, the 1897 Organic Act, and 36 C. F. R. 252. Also, *Ventura* involved a lessee who had complied with a host of strict federal regulations and entered into a comprehensive lease with the U. S. Government, only to be faced by a zoning permit the issuance of which was subject to much discretion on the part of the local planning board. 601 F. 2d at 1082-1084. The Ninth Circuit found such permit procedure to pose, under the circumstances, a direct obstacle to the achievement of the objectives of the Mineral Lands Leasing Act. 601 F. 2d at 1086. The situation here is distinguishable. Petitioners, unlike the lessee in *Ventura*, have not gained federal approval for their operations. Indeed, they are at present enjoined by the federal courts from dredge mining on Sherlock Creek because of their failure to comply with federal regulations. Moreover, even if petitioners had complied with federal regulations, they were not faced with an ultimate veto by the state. Compliance with the Dredge Mining Act would have, instead, allowed them to proceed with dredge mining. In turn, those state requirements would have furthered, not obstructed, the objectives of federal mining legislation.[5]

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[5]This conclusion is buttressed by 36 C. F. R. 252.5 (b) (App. 12), which provides that pending final federal approval of an operating plan, mining will be conducted in accordance with federal and state laws. Here, there was never final approval of an operating plan. In this situation, concurrent jurisdiction is expressly recognized.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

DON OLOWINSKI
Deputy Attorney General
Chief, Natural Resources Division
State of Idaho

Appendix

APPENDIX 1

554 P.2d 969

STATE of Idaho ex rel. Cecil D. ANDRUS, Governor, et al., Plaintiff-Appellant,

v.

James CLICK, Sr., et al., Defendants-Respondents.

No. 11926.

Supreme Court of Idaho.

Sept. 24, 1976.

DONALDSON, Justice.

The defendants-respondents, James Click, Sr., Eugene Weiss, and Oral (Orral) Lake, are residents of Montana doing business in Idaho as a mining partnership. They conduct a dredge mining operation upon unpatented federal public domain land within the St. Joe National Forest in Idaho under valid federal mining claims. The operation adjoins a section of Sherlock Creek, a tributary of the St. Joe River.

Respondents have conducted their mining operation without acquiring or applying for a permit from the State of Idaho to do so, as required by the Idaho Dredge and Placer Mining Protection Act. I. C. Title 47, ch. 13 (hereinafter, Dredge Mining Act). In conformance with the procedure set forth in I. C. § 47-1324 plaintiff-appellant State of Idaho, on the relation of the Board of Land Commissioners, sought to enjoin respondents' mining operation by filing an action in the Federal District Court for the State of Idaho. A counterclaim was filed by respondents requesting the district court to declare the Act unconstitutional. Although the federal court dismissed the complaint for lack of jurisdiction, a three judge court was impaneled to hear the issues presented by the counterclaim. Sub-

sequently, however, on March 24, 1972 appellant commenced this action in First Judicial District Court whereupon the federal court abstained from further action pending the outcome.

By this action the board of land commissioners seek to enjoin respondent miners from further mining activity on their claims until they comply with the Dredge Mining Act.[1] A preliminary injunction was granted on December 28, 1972 restraining respondents from conducting any dredge or placer mining operations. The respondents answered and counterclaimed on February 5, 1973 asking for a declaratory judgment decreeing the Dredge Mining Act unconstitutional. Following a hearing on January 24, 1974, the district court found for the respondents, dissolved the preliminary injunction and enjoined the State of Idaho from attempting to regulate, restrict or prevent the operations of the defendants under the Idaho Dredge Mining Act. The State of Idaho appeals.

It was the conclusion of the district court that the Dredge Mining Act would interfere with the property power of Congress if applied to unpatented mining claims located on the federal public domain. Congress is granted power to manage public domain property by the Property Clause, Article IV, § 3, clause 2 of the United States Constitutoin. That clause gives Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *."

The United States Supreme Court recently pointed out that "while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that '[t]he power over

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1. The Idaho State Board of Health joined in this action and in the federal action claiming that defendants had failed also to comply with other statutory requirements. They were removed as plaintiffs by stipulation of the parties. The Idaho district court determined the Dredge Mining Act to be the only act in question.

the public land thus entrusted to Congress is without limitations.' • • • In short, Congress exercises the powers both of a proprietor and of a legislature over the public domain." *Kleppe v. New Mexico*, — U. S. —, —, 96 S. Ct. 2285, 2291-92, 49 L. Ed. 2d 34 (1976). Most certainly then, where Congress has exercised its legislative prerogative, conflicting state laws must fall by reason of the Supremacy Clause. U. S. Const. art. VI, clause 2. Absent congressional action, however, the state retains jurisdiction over federal lands within its territory. *Kleppe v. New Mexico, supra.* The rule was stated in *Omacchevarria v. Idaho*, 246 U. S. 343, 38 S. Ct. 323, 325, 62 L. Ed. 763 (1918):

> "The police power of the state extends over the federal public domain, at least when there is no legislation by Congress on the subject."

See also McKelvey v. United States, 260 U. S. 353, 43 S. Ct. 132, 67 L. Ed. 301 (1922).

The difficulty, of course, is to determine whether there is superseding federal legislation "on the subject." Our determination is guided where possible by applicable principles of federal preemption. These cannot, however, provide precise guidelines "for each case turns on the peculiarities and special features of the federal regulatory scheme in question." *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U. S. 624, 93 S. Ct. 1854, 36 L. Ed. 2d 547 (1973). Consequently, we begin with an examination of the provisions of the applicable state and federal legislation.

The foundation for federal mining law was laid by the Act of May 10, 1872, 17 Stat. 91 (codified at 30 U. S. C. § 21 et seq.). That Act provides that, in order to encourage development of mineral resources, citizens may enter and explore the public domain with the purpose of locating valuable mineral deposits. 30 U. S. C. § 22. The locator has the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, 30 U. S. C. § 26. These provisions are equally applicable to placer miners. 30 U. S. C. § 35. In addition, the locator is granted the right to remove surface vegetation and to

cut timber as may be necessary for mining purposes as well as to appropriate needed water. 30 U. S. C. § 612; *see also* 54 Am. Jur. 2d *Mines and Minerals* § 57 (1971). In order to retain his claim the locator is required to expend $100 of labor or improvements each year. 30 U. S. C. § 28. The locator may obtain fee title to the land by meeting the requirements necessary to obtain a patent. 30 U. S. C. § 29.

The Idaho Dredge and Placer Mining Protection Act was enacted in 1955.[2] The Act is administered by the Idaho State Board of Land Commissioners which is empowered to adopt rules and regulations for its administration and to "make such inquiries and investigations and conduct such hearings as the board shall deem advisable or necessary." I. C. § 47-1316. In general, the Act requires operators of dredge or placer mines on lands and beds of streams in the *State of Idaho* to obtain a permit. In order to obtain the permit the operator must pay a set fee, I. C. § 47-1317 (a), and obtain a surety bond minimum $10,000 for ten acres or less) conditioned for faithful performance. He may post cash in lieu of the bond. I. C. § 47-1317 (b). Should the applicant for the permit not be the owner of the land, the owner of the lands must endorse his approval on the application for the permit. I. C. § 47-1317 (e). The board can deny an application for a permit,

> "on state land, stream or river beds, or on any unpatented mining claims, upon its determination that a dredge mining operation on the land proposed would not be in the public interest, giving consideration to economic factors, recreational use for such lands, fish and wildlife habitat and other factors which in the judgment of the state land board may be pertinent." I. C. § 47-1317 (h).

Once obtained, a permit is not transferable. I. C. § 47-1317 (f).

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2. Submitted as an initiative measure November 2, 1954, the proposal was approved by a majority of the voters, 174,377 votes being cast for the proposal and 30,102 votes being cast against.

Where the permittee disturbs the ground in conducting his operation, he is required to level and smooth over such ground "reasonably comparable with the natural contour of the ground prior to such disturbance, and to a condition conducive to the growth of verdure." I. C. § 47-1314. This must be done "within sixty (60) days after the disturbance of the ground * * * or such longer and reasonable period of time, not to exceed two (2) years, as may be granted by the director of the department of lands in any particular case, to meet land and watercourse restoration requirements." I. C. § 47-1321. Should substantial topsoil have been removed the operator is required to replace topsoil and plant grass, trees and other vegation so as to restore the land to its original condition "insofar as is reasonably possible after the conclusion of the dredging operation." I. C. § 47-1314. Any watercourse disturbed by the dredging must be replaced on meander lines with pool structure conducive to good fish and wildlife habitat and recreational use, I. C. § 47-1314, and where water used in mining flows into a stream the operator must construct settling ponds and use filtration processes adequate to clarify the water to conform to the standards and regulations of the state board of health for water quality control (now the department of health and welfare. See I. C. § 39-105). I. C. § 47-1315.

In order to determine compliance with these provisions the state board of land commissioners is empowered to conduct periodic inspections of the operations. The cost of the inspections is to be borne by the permittee "which such costs and expenses shall constitute a lien upon the land specified in the permit and the minerals produced therefrom." I. C. § 47-1317 (d).

Violation of the terms of the Act can result in a termination of the permit, I. C. § 47-1318 or forfeiture of the bond, I. C. § 47-1319. In addition, a failure to comply with the Act is declared to be a misdemeanor. I. C. § 47-1321. The state board of land commissioners is also empowered to bring an action to enjoin those operators who do not hold permits. I. C. § 47-1324. Procedures for hear-

ings and appeal are provided for by I. C. §§ 47-1318 and 47-1320.

Where there is a direct collision between state and federal legislation our task is simple, the federal legislation would preempt state legislation by reason of the supremacy clause, United States Const. art. VI, clause 2; *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U. S. 132, 929, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963). However, state regulation which is more stringent than that under the federal legislation is not the type of conflicting legislation described by this standard. *See e. g., Northern States Power Co. v. Minnesota*, 447 F. 2d 1143 (8th Cir. 1971) (involving Minnesota pollution control requirements substantially more stringent than federal regulations). That is, the mere fact that federal legislation sets low standards of compliance does not imply that the federal legislation grants a right to an absence of further regulation. On the other hand, where a right is granted by the federal legislation, state regulation which rendered it impossible to exercise that right would be in conflict.

We find no such conflict is presented by the provisions of the Idaho Act requiring a permit or the restoration of the land.[3] Neither the requirement of obtaining a permit

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3. Respondents also contend that the permit requirement is unconstitutional because it is in direct conflict with federal legislation. Idaho Code § 47-1317 (h) empowers the Board of Land Commissioners to deny any application for a permit "upon its determination that a dredge mining operation * * * would not be in the public interest." Respondents contend that the Board cannot have such power since Congress has already determined that the development of placer and lode mineral deposits is in the national interest, citing 30 U. S. C. §§ 21a, 22. They argue that since the Board's authority to deny applications for permits is unconstitutionally overbroad, the permit requirement is invalid. In the present case, however, there was no application for a permit and no determination by the Board that respondents' operation was not in the public interest. We therefore decline to decide whether I. C. § 47-1317 (h) would be unconstitutional if used to deny

(Continued on following page)

or of restoring the land render it impossible to exercise rights specifically granted by the federal legislation, although they may make it more difficult. Respondents argue that restoration requirements could render it impossible for them to mine their remaining lode deposits following the termination of their dredge operation. They assert they would have to reexcavate much of the restored land. Certainly, under the standard enunciated above these provisions of the Idaho Act would be unenforceable to the extent they rendered it impossible to mine the lode deposit. However, we find no such impossibility presented on the face of the statute. Indeed, in the present case there was some evidence that lode and dredge operations would be conducted simultaneously.

The absence of further direct conflict between the state and federal legislation does not necessarily close the question of federal preemption. Congress can preempt even harmonious state regulation where it so intends. Such an intent can be evidenced either expressly or by implication. *See Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947); *Northern States Power Company v. Minnesota, supra.* The court in *Rice* pointed out:

> "It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide." 331 U. S. at 230-31, 67 S. Ct. at 1152.

In *Northern States Power Company v. Minnesota, supra,* the court sought to list the key factors in making such a determination. They include, *inter alia*: (1) the aim and intent of Congress as revealed by the statute itself and its legislative history, (2) the pervasiveness of the

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(Continued from preceding page)

mination by the Board that respondents' operation was not in the public interest. We therefore decline to decide whether I. C. § 47-1317 (h) would be unconstitutional if used to deny a permit application from respondents. *Curtis v. Child,* 95 Idaho 63, 501 P. 2d 1374 (1972); *State v. Clark,* 88 Idaho 365, 399 P. 2d 955 (1965).

federal regulatory scheme as authorized and directed by the legislation and as carried into effect by the federal administrative agency, (3) the nature of the subject matter regulated and whether it is one which demands exclusive federal regulation in order to achieve uniformity vital to national interests, and (4) whether under the circumstances of a particular case state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See also Rice v. Santa Fe Elevator Corp., supra.*

At the outset we point out that

> "In determining whether state regulation has been pre-empted by federal action, 'the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state.'" *Huron Portland Cement Co. v. City of Detroit, Mich.*, 362 U. S. 440, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960) citing *Savage v. Jones*, 225 U. S. 501, 533, 32 S. Ct. 715, 56 L. Ed. 1182 (1912).

Consequently, we put aside respondents' suggestion that the state has no power to license an activity sanctioned by the federal government. This would not be so even if the federal government had issued a license of its own. In *Florida Lime and Avocado Growers, Inc. v. Paul, supra* the United States Supreme Court held in a related area:

> "[I]t is suggested that a federal license or certificate of compliance with minimum federal standards immunizes the licensed commerce from inconsistent or more demanding state regulations. While this suggestion draws some support from decisions which have invalidated direct state interference with the activities of interstate *carriers, Castle v. Hayes Freight*

Lines, Inc., 348 U. S. 61, 75 S. Ct. 191, 99 L. Ed. 68, even in that field of paramount federal concern the suggestion has been significantly qualified, e. g., *Huron Portland Cement Co. v. Detroit*, 362 U. S. 440, 447-448, 80 S. Ct. 813, 818, 4 L. Ed. 2d 852, *Kelly v. Washington*, 302 U. S. 1, 58 S. Ct. 87, 82 L. Ed. 3; cf. *Bradley v. Public Utilities Comm'n*, 289 U. S. 92, 53 S. Ct. 577, 77 L. Ed. 1053. That no State may completely exclude federally licensed commerce is indisputable, but that principle has no application to this case." 373 U. S. at 141-42, 83 S. Ct. at 1217.

Returning to the factors enunciated above, we find nothing in the federal statute or its legislative history to indicate an intent to preempt state regulation. Indeed, the federal statute specifically recognizes the state's right to impose additional requirements in some areas. For example, even where standards are set for the location of mining claims, nonconflicting state requirements are upheld. 30 U. S. C. § 26; I. C. § 47-601 et seq.

Nor can the federal statute be characterized as a pervasive regulatory scheme. If anything, the federal statute is characterized by its absence of regulation. Although the Forest Service recently promulgated regulations which purport to give them a greater part in the control of mining operations, 39 Fed. Reg. 31317-21, both these regulations and the statutes authorizing their promulgation specifically recognize the viability of existing state regulations. 16 U. S. C. §§ 551, 551a.

We also fail to find preemptive qualities in the nature of the subject matter regulated. As stated in *Mendiola v. Graham*, 139 Or. 592, 10 P. 2d 911, 915 (1932):

> "It will not be contended that the federal government has not the right to conserve the natural resources of the public domain, and, where the federal government has not acted, the state, through its police power, may exercise such right and privilege. The state, as well as the United States, is vitally interested in preserving the natural resources within its boundaries."

Indeed, the preservation of the environmental quality of its lands is a subject particularly suited to administration by the states. Congress has recognized that even where extensive federal environmental legislation exists, the primary responsibility for implementing environmental policy rests with state tand local governments. 42 U. S. C. § 4371(b)(2); *see also* 42 U. S. C. § 4331(a).

Finally, respondents assert that implementation of the Dredge Mining Act would interfere with the objectives and purpose of Congress. This purpose, they assert, is to encourage the development of valuable mineral deposits.

We grant that enactment of the Act of May 10, 1872 was prompted mainly by hopes of economic development. *Heydenfeldt v. Daney Gold and Silver Mining Co.*, 93 U. S. 634, 23 L. Ed. 995 (1877). Concern for the environmental impact of this development, if present, was not voiced. Nevertheless, in recent years that extreme policy has been tempered.

In the Mining and Minerals Policy Act of 1970 Congress stated its policy as follows:

> "The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metals and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs, (3) mining, mineral, and metallurgical research, including the use and recycling of scrap to promote the wise and efficient use of our natural and reclaimable mineral resources, and (4) the study and development of methods for the disposal, control, and reclamation of mineral waste products, and the reclamation of mined land, so as to lessen any adverse impact of mineral extraction and processing upon the

physical environment that may result from mining or mineral activities." 30 U. S. C. § 21a.

In addition, Congress has lately declared its support for environmental legislation in the National Environmental Policy Act:

"(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components on the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U. S. C. § 4331(a).

and at 42 U. S. C. § 4371 where it declares:

"(a) The Congress finds—

(1) that man has caused changes in the environment;

(2) that many of these changes may affect the relationship between man and his environment; and

(3) that population increases and urban concentration contribute directly to pollution and the degradation of our environment.

(b) (1) The Congress declares that there is a national policy for the environment which provides for the enhancement of environmental quality. This pol-

icy is evidenced by statutes heretofore enacted relating to the prevention, abatement, and control of environmental pollution, water and land resources, transportation, and economic and regional development.

(2) The primary responsibility for implementing this policy rests with State and local governments."

These statements all evidence a concern that development be carried out wherever possible so as to minimize its adverse impack on environmental quality. We find the Dredge Mining Act to be in harmony with this goal. Consequently, we conclude that the Idaho Dredge Mining Act is applicable to operators of dredge or placer mines on unpatented federal property in Idaho.

• • •

I. C. § 47-1312. Policy. — It is hereby declared to be the policy of the state of Idaho to protect the lands, streams and watercourses within the state, from destruction by dredge mining and by placer mining, and to preserve the same for the enjoyment, use and benefit of all of the people, and that clean water in the streams of Idaho is in the public interest. [1955 Init. Meas., § 1; am. 1969, ch. 281, § 1, p. 845.]

36 C. F. R. § 252.5. (b) Pending final approval of the plan of operations, the authorized officer will approve such operations as may be necessary for timely compliance with the requirements of Federal and State laws, so long as such operations are conducted so as to minimize environmental impacts as prescribed by the authorized officer in accordance with the standards contained in § 252.8.

Brief for the United States

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No. 81-912

In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES CLICK, SR., EUGENE WEISS and ORRAL LAKE, PETITIONERS

v.

STATE OF IDAHO, EX REL. JOHN V. EVANS, GOVERNOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the former holders of unpatented mining claims on public lands may challenge a state court injunction against mining activity when their claims have been declared void by the Bureau of Land Management and a federal court has also enjoined their mining activity.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the Supreme Court of Idaho (Pet. App. 1a-18a) is reported at 102 Idaho 443, 631 P.2d 614. The prior opinion of the same court filed September 24, 1976 (Br. in Opp. App. 1-12) is reported at 97 Idaho 791, 554 P.2d 969. The decision and order of the Idaho State District Court of the First Judicial District, Shoshone County (Pet. App. 25a-32a), later partially stayed (Pet. App. 22a-24a), is unreported. The state district court's prior decision

of March 5, 1975 (see Pet. App. 41a-43a), is unreported.

JURISDICTION

The judgment of the Idaho Supreme Court was entered on May 27, 1981. Rehearing was denied on August 17, 1981 (Pet. App. 19a). The petition for a writ of certiorari was filed November 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATEMENT

1. In 1969, petitioners began dredge mining (Pet. App. 2a) on federal land in the Idaho Panhandle National Forest.[1] Petitioners had 11 unpatented placer mining claims there, known as Kismet Claims Nos. 1 to 11, adjacent to Sherlock Creek, a tributary of the St. Joe River.[2] Petitioners removed topsoil, brush, and trees, bulldozed a diversion channel for Sherlock Creek, and dug a pit 90 feet long to operate a dragline-fed sluice washing plant (Pet. App. 35a).

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[1] These placer mining claims were located by petitioners or their predecessors in interest under the Mining Act of 1872, 30 U.S.C. 21 *et seq.* See *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 605-607 nn. 3 & 4, 615-616 (1978); *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 335-336 (1963).

The parties stipulated that the 11 claims were, with reference to the rectangular survey system, located in:

—the north half of section 14,
—the south half of section 15,
—the northeast quarter of section 20,
—the north half of section 21,
—and the northwest quarter of section 22

all in Township 43 North, Range 10 East, Boise Meridian (Pet. App. 34a).

[2] Respondents stipulated that "Sherlock Creek is a nonnavigable stream in the federal sense" (Pet. App. 35a).

In 1972, respondents—the State of Idaho on the relation of the board of land commissioners, its governor, and five other state officials and agencies—brought this action for injunctive relief in state court against petitioners, alleging that their dredge mining without a state permit violated the Idaho Dredge and Placer Mining Protection Act (Dredge Act), Idaho Code § 47-1312 *et seq.* (1977). To date, petitioners have not applied for a state permit (Pet. App. 12a n.3).

The Idaho state district court initially held (Br. in Opp. App. 2), in 1975, that the Dredge Act was unconstitutional insofar as it applied to unpatented mining claims on federal public lands, because it was preempted by the authority granted to Congress by the Property Clause, U.S. Const. art. IV, § 3. The district court's decision was reversed in 1976 by the Idaho Supreme Court (Br. in Opp. App. 1-12), and the case was remanded for a determination of the state's request for injunctive relief. *State Ex Rel. Andrus* v. *Click*, 97 Idaho 791, 554 P.2d 969 (1976). On remand, the state district court on July 7, 1978, granted the state's request for injunctive relief forbidding further dredge and placer mining on the 11 Kismet Claims until petitioners obtained a state permit. The court also, pursuant to Idaho Code § 47-1324 (1977),[3] required petitioners to restore the dis-

[3] Idaho Code § 47-1324 (1977) provides that:

> The state board of land commissioners may maintain an action in the name of the state of Idaho to enjoin any person, firm or corporation from operating or maintaining a dredge or placer mine without holding a valid permit therefor as provided in this act. * * * Upon a showing of good cause therefor, the temporary restraining order may require the defendant to make restoration of the mined area in conformity with section 47-1314, Idaho Code, pending final disposition of the action. * * *

turbed ground to a condition reasonably comparable to its natural contour, replace topsoil and vegetation, and relocate Sherlock Creek "on meander lines with pool structure conducive to good fish and wildlife habitat and recreational use" (Pet. App. 30a-31a).[4]

The Idaho Supreme Court affirmed (Pet. App. 1a-18a). *State Ex Rel. Evans* v. *Click*, 102 Idaho 443, 631 P.2d 614 (1981). The court adhered to its earlier conclusion that the Dredge Act was not preempted by the Property Clause or by federal mining law. It also held that restoration, though it would make mining more difficult, would not render it impossible and thereby frustrate the development of mineral resources which the Mining Act of 1872 was meant to encourage (Pet. App. 5a-6a). The Idaho Supreme Court declined to consider, because it was "never put into issue below" (Pet. App. 14a), the argument that petitioners' failure to obtain a permit was irrelevant, since the state in 1977 had amended Idaho Code § 47-1323 (1980 Cum. Supp.) to forbid dredge mining altogether on the St. Joe River and its tributaries. In any event, the court found the injunction was warranted because of petitioners' failure to obtain a permit between the commencement of their mining activities in 1969 and the passage of the 1977 amendment (*ibid.*). The court also declined to consider petitioners' claim that the 1977 amendment constituted a "taking" of their federal mining rights,

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[4] Restoration was to conform to a plan prepared by the director of the Idaho Department of Lands (Pet. App. 31a). Petitioners were to complete the restoration within 60 days of the issuance of the plan (*ibid.*). The order was later stayed by the district court until July 1, 1979 (Pet. App. 22a-24a). A further extension was denied (Pet. App. 21a).

In its decision on remand and its later order granting a stay, the state district court imposed a "lien" on petitioners' mining claims and machinery to secure the costs of restoration.

since that question was the subject of another pending action brought by petitioners in state court (*id.* at 15a). Petitioners now seek review of the Idaho Supreme Court's decision.

2. Petitioners have failed to point out that they have no right to mine the Kismet claims under federal law. On June 14, 1978—several weeks before the Idaho district court granted the state's request for injunctive relief—the United States District Court for the District of Idaho enjoined petitioners from further mining and related activities on the same claims. *United States* v. *E.B. Weiss, James Click, Sr., Orral W. Lake, H.G. King, and Orson Baier*, Civil No. 2-76-59 (D. Idaho June 14, 1978).[5]

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[5] A copy of the court's order is attached as Appendix A, *infra*. The court's order enjoins "mining and related activities on * * * the Kismet Claims, situate in Sections 14, 15, *16*, 21 and 22 of Township 43 North, Range 10 East of the Boise Meridian" (App. 1a-2a). The stipulation of the parties filed in state district court stated that the claims in question were located in sections 14, 15, *20*, 21, and 22. See Pet. App. 34a; note 1, *supra*. The discrepancy does not appear to be significant.

On August 22, 1978, the federal district court modified its injunction to permit performance of required assessment work, unless the Secretary of the Interior granted a deferment under 30 U.S.C. 28b. A copy of order is attached as Appendix B, *infra*. On August 28, 1978, the Idaho State Office of the Bureau of Land Management granted petitioners a deferment for assessment work which otherwise had to be done on their claims by September 1, 1978. The deferment was granted for a period of one year, and was made renewable (see 30 U.S.C. 28c) "if justifiable conditions continue to exist." A copy of the deferment is attached as Appendix C, *infra*. We are informed that no subsequent deferments were issued, and that none is currently in effect. See Appendix D, *infra*, 9a-10a.

The federal action had been brought by the United States to enjoin mining on the Kismet claims because petitioners had failed to comply with regulations promulgated by the Secretary of Agriculture concerning unpatented mining claims located in national forests. The regulations require mining claimants in a national forest to submit a "notice of intention to operate" and a detailed "plan of operations" to the Forest Service's local district ranger for approval. 36 C.F.R. 252.4, 252.5.[6] Claimants may also be required to post a bond. 36 C.F.R. 252.13(a). Petitioners never "signed and filed a final plan of operations," and never submitted a bond, though required to do so by the Forest Service. *United States* v. *Weiss*, 642 F.2d 296, 297 (9th Cir. 1981). The Ninth Circuit affirmed the decision of the district court on April 13, 1981. *Ibid.*[7]

Not only has the Ninth Circuit enjoined petitioners from mining the area in question, but the Idaho State Office of the Bureau of Land Management has declared Kismet Claims Nos. 1-11 void. The Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1744(a), and the regulations implementing it, 43 C.F.R. 3833.2-1, required petitioners to file by October 22, 1979, either a notice of intention to hold the mining claims or an affidavit of assessment work

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[6] The regulations are found at 36 C.F.R. Part 252. They have, however, been redesignated as 36 C.F.R. Part 228. See 46 Fed. Reg. 36142 (1981).

[7] The Ninth Circuit's decision was discussed by the Idaho Supreme Court (Pet. App. 6a-11a n.2). It is also cited by petitioners (Pet. 25), and discussed by respondents (Br. In Opp. 1-2, 8 n.4, 9).

performed on the claims.[8] The statute and the regulations further provide that "[t]he failure to file an instrument required by * * * 3833.2-1 of this title within the time periods prescribed therein, shall be deemed conclusively to constitute an abandonment of the mining claim * * * and it shall be void." 43 C.F.R. 3833.4; 43 U.S.C. 1744(c). Petitioners filed neither a notice of intention to hold nor an affidavit of assessment work. Consequently, the BLM Office, by letter dated November 8, 1979, declared petitioners' claims void (App. E, *infra*).[9] Its decision was affirmed (App. F, *infra*) by the Interior Board of Land Appeals on August 25, 1980. *Max Weiss*, 49 IBLA 332.

3. On November 10, 1978, Congress amended Section 3(a) of the Wild and Scenic Rivers Act to prohibit "[d]redge or placer mining * * * within the banks or beds of the main stem of the Saint Joe [River] and its tributary streams in their entirety above the confluence of the main stem with the North Fork of the river." 16 U.S.C. (Supp. IV) 1274(a)(23). Petitioners' claims are located along

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[8] The statute provides that a notice of intention to hold the mining claim may be filed "when there has been a * * * deferment of annual assessment work * * *." 43 U.S.C. 1744(a)(1). See also 43 C.F.R. 3833.2-3(a)(2). On August 28, 1978 petitioners were granted a deferment for the period September 1, 1977, through August 31, 1978 (App. 6a, *infra*). No other deferment was granted.

[9] The BLM Office letter of November 8, 1979, contains no explicit reference to Kismet Claims Nos. 1 to 11. It begins by stating that "[y]our notice/certificate of mining claim location identified above is returned together with the filing fee" (App. 11a, *infra*). We are informed, however, that the letter referred to those claims (App. D, *infra*, 9a).

Sherlock Creek, which is a tributary of the St. Joe River upstream of the confluence of its main stem with the North Fork. See H.R. Doc. No. 95-315, 95th Cong., 2d Sess. 48, 115 (1978).

DISCUSSION

Petitioners assert that "the entire scheme of the implementation of the Idaho Dredge and Placer Mining Protection Act"—the permit and restoration requirements, the prohibition of mining on Sherlock Creek, and the imposition of a lien to secure the costs of restoration—"prohibit the exercise by Petitioners of rights granted under the federal mining laws and impermissably [sic] conflict with congressional regulation and disposition of federal land" (Pet. 23). It may be that the interaction of federal and state law governing activity on federal mining claims located in national forests will at some time merit review by this Court. This case, however, is not an appropriate occasion for such review. Whatever argument petitioners may have had that the state court injunction interfered with their rights under federal mining law has been rendered moot. Cf. *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974). Petitioners have been enjoined by a federal court from mining and related activities on the Kismet Claims for failure to comply with the regulations of the Forest Service, and the Bureau of Land Management has declared petitioners' Kismet Claims void for failure to comply with the filing requirements of FLPMA and the BLM regulations implementing it.

Moreover, the objection which petitioners now seek to raise to Idaho's 1977 amendment of Idaho Code § 47-1323 (1980 Cum. Supp.)—even assuming that they are entitled to present the issue at this late stage

(see Pet. App. 14a)—is defused by the 1978 amendment to the Wild and Scenic Rivers Act. Since petitioners never submitted a plan of operations to the Forest Service it is not possible to say with certainty that their mining activity would take place "within the banks or beds" of Sherlock Creek within the meaning of the statute. 16 U.S.C. (Supp. IV) 1274(a)(23). But it is entirely possible that Idaho's parallel prohibition only imposes a lesser—or at most identical—restraint on the mining activity in which petitioners wish to engage. What Section 47-1323 says is that "[d]redge mining in any form shall be prohibited on * * * [t]he St. Joe river, including tributaries, from its origin to its confluence with Coeur d'Alene lake, except for the St. Maries river and its tributaries." Though that provision, like the Wild and Scenic Rivers Act, covers the portion of the river where petitioners' former claims were located, its prohibition of mining "on" the river may mean the same thing as the federal ban on activity "within the banks or beds."

There is accordingly no need here to decide whether state law has been displaced by federal mining law, because petitioners have no rights under federal law with which Idaho's Dredge Act has interfered. In accordance with its usual practice, we submit this Court should defer consideration of the questions now tendered until they are presented in a case which " 'touch[es] the legal relations of parties having adverse legal interests.' " *Defunis* v. *Odegaard*, *supra*, 416 U.S. at 317, quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General
CAROL E. DINKINS
Assistant Attorney General
ANNE S. ALMY
DIRK S. SNEL
Attorneys

MAY 1982

Appendix

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 2-76-59

UNITED STATES OF AMERICA, PLAINTIFF

v.

E. B. WEISS, ET AL., DEFENDANTS

[Filed Jun. 14, 1978]

ORDER GRANTING SUMMARY JUDGMENT
AND INJUNCTION

This matter is before the Court on Cross-Motions for Summary Judgment. The Court heard the parties on March 17, 1978. Documentary evidence, Affidavits and Briefs have been filed and considered.

The Court orally announced that Plaintiff was entitled, as a matter of law, to an Injunction enjoining the Defendants from further mining and related activities on the unpatented mining claims held by the Defendants pending approval of a Plan of Operation by the Secretary of Agriculture in accordance with appropriate regulations.

From the record before me it is clear that there is no genuine issue as to any material fact and that the Plaintiff is entitled to Summary Judgment and Injunctive Relief as a matter of law.

IT IS THEREFORE ORDERED:

That the Defendants, their representatives, agents, employees, servants and assigns are hereby enjoined from all mining and related activities on those cer-

tain mining claims, commonly known as the Kismet Claims, situate in Sections 14, 15, 16, 21 and 22 of Township 43 North, Range 10 East of the Boise Meridian. Said Injunction to remain in force until an operating plan, as required by regulations duly promulgated by the Secretary of Agriculture concerning unpatented mining claims located in the National Forests, has been submitted by the Defendants and approved by the Secretary of Agriculture, or until further order of this Court.

/s/ Ray McNichols
RAY MCNICHOLS
Chief Judge
United States District Court

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

Civil No. 2-76-59

UNITED STATES OF AMERICA, PLAINTIFF

vs.

E. B. WEISS, ET AL., DEFENDANTS

[Filed Aug. 22, 1978]

ORDER MODIFYING INJUNCTION PENDING APPEAL

This matter is before the Court on Defendants' Application for Modification of Order Pending Appeal. The Court heard oral argument for the parties on August 21, 1978. Affidavits and Briefs have been filed by the parties and considered by the Court. Defendants request modification of this Court's Order Granting Summary Judgment and Injunction entered June 14, 1978 to permit performance of required assessment work prior to the deadline of September 1, 1978 on those claims affected by the Court's Order.

The Court finds that its Order of June 14, 1978 does create a legal impediment which prevents Defendants from performing the necessary assessment work on their Kismet Claims as required by federal and state law. The Court further finds that 30 U.S.C., § 28b permits the Secretary of Interior to defer that assessment work in this situation and that such deferral would be binding upon the United States as well as third parties so that Defendants

are and will be fully protected from loss of their mining claims to either the United States or third parties as a result of their inability to perform assessment work on those claims. The Court did not intend that its Order of June 14, 1978 result in a forfeiture of Defendants' property rights with respect to their Kismet Claims.

IT IS THEREFORE ORDERED: That Defendants immediately file application to the Department of Interior for deferral of the assessment work required by 30 U.S.C. § 28, as provided in 30 U.S.C., § 28b. In the event the Department of Interior does not grant such deferral by the close of business on Monday, August 28, 1978, the restraining order of this Court, introduced on June 14, 1978, is temporarily suspended for a reasonable period to permit Defendants to perform the statutorily required annual assessment work in accordance with the operating plan for such work submitted by Defendants in connection with their Application for Modification of Order Pending Appeal.

This Order does not authorize the Defendants to do any act which will be contrary to any existing order of any other court relative to mining, working, or otherwise entering on the involved mining claims. Specifically, this Order is not intended to affect any outstanding order, ruling, or decision of Judge Towles of the First Judicial District of the State of Idaho.

/s/ Ray McNichols
RAY MCNICHOLS
Chief Judge
United States District Court

APPENDIX C

UNITED STATES DEPARTMENT
OF THE INTERIOR

[SEAL]

BUREAU OF LAND MANAGEMENT
Idaho State Office
Federal Building, Box 042
550 W. Fort Street
Boise, Idaho 83724

Certified Mail
RETURN RECEIPT REQUESTED

DECISION

Temporary Deferment

JAMES CLICK, ORRAL LAKE,
H. G. KING and E. B. WEISS
c/o BARRY MARCUS, Attorney at Law
Marcus Building
737 North 7th Street
Boise, Idaho 83702

[Filed Aug. 28, 1978]

DEFERMENT OF ANNUAL ASSESSMENT
WORK GRANTED

James Click, Orral Lake, H. G. King and E. B. Weiss have filed a petition through their Attorney in Fact and Law, Barry Marcus, for deferment of assessment work covering their mining claims shown as Exhibit A of this decision. Pursuant to the regulations contained in Title 43 Subpart 3852, the applicants are granted a deferment from the performance

of assessment work due September 1, 1978. The deferment applies to those mining claims named on Exhibit A.

Access to the claims is pending the Regional Forester's approval of an operating plan.

The deferment shall be for a period of one year beginning September 1, 1977 through August 31, 1978, subject to the following conditions:

1. The deferment granted shall be renewable for a further period of one year if justifiable conditions continue to exist.
2. This deferment granted shall terminate automatically as of the date conditions preventing the assessment work from being done are removed.
3. All deferred assessment work may be performed at any time after termination of the deferment, or renewal thereof, but must be completed not later than the end of the first assessment year commencing after the termination of the deferment, and shall be in addition to the annual assessment work required by law for such latter year.
4. This deferment must not be construed as a determination either that a valid discovery has been made or, if made, continues to subsist on any of the claims involved, or that the required annual assessment work has been performed as required by law for any assessment year ending prior to the date of application for temporary deferment.

In accordance with the regulations 43 CFR 3852, the applicants must file or record in the office in which it filed or recorded its petition, this decision disposing

of the petition. Evidence of the recordation must be submitted to this office within thirty (30) days from the date this decision is received.

/s/ Vincent S. Strobel
VINCENT S. STROBEL
Chief
Branch of L&M Operations

In duplicate

Sworn to and subscribed to before me this 28th day of August 1978.

/s/ Ordeen H. Yeary
ORDEEN H. YEARY
Notary Public

My commission is lifetime.

cc: Regional Forester, Ogden
U.S. Attorney
Attn: Jeff Ring

EXHIBIT A

KISMET MINING CLAIMS
SHOSHONE CO., IDAHO

Kisnet Claim No.	Location Notice Recorded in:	Page No.	Located—Relocated
	* * * * *		
1	Book P of Placer Claims	337	9/3/53—
2	" " "	339	11/6/65
3	" " "	341	"
4	" " "	343	"
5	" " "	345	"
6	" " "	347	11/7/65
7	" " "	349	"
8	" " "	351	"
9	" " "	355	"
10	" " "	353	"
11	" " "	357	"

APPENDIX D

IN REPLY REFER TO
3833 (943)

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR

BUREAU OF LAND MANAGEMENT
Idaho State Office
Federal Building - Box 042
550 W. Fort Street
Boise, Idaho 83724

April 22, 1982

AFFIDAVIT

Vincent S. Strobel, first being duly sworn, deposes and says that he is the Chief, Branch of Lands and Minerals Operations, Idaho State Office, Bureau of Land Management, Department of the Interior at Boise, Idaho, and as such, is supervisor to the custodian of the land records maintained here.

THAT attached is a copy of the complete recordation file of mining claims under Section 314 of the Federal Land Policy and Management Act of 1976 for the Kismet No. 1 through 11 claims, I MC 45403.

THAT our letter dated November 8, 1979, in that file, pertains to and closed Kismet Claims 1 through 11, for lack of a proof of labor or notice of intent to hold being filed prior to October 22, 1979 as required by 43 CFR 3833.2(a).

THAT this decision by the Idaho State Office was subsequently affirmed by an Interior Board of Land Appeals decision decided August 25, 1980.

THAT an additional check has been made of the land records to determine the number of Temporary Deferments of Assessment Work issued on the Kismet Claims 1 through 11 and that this check has discovered only one Deferment which was granted on August 23, 1978.

THAT the Kismet Group is considered as abandoned and void in accordance with 43 CFR 3833.4.

/s/ Vincent S. Strobel
VINCENT S. STROBEL

Subscribed and sworn to before me this 22 day of April, 1982.

[SEAL]

/s/ Ordeen H. Yeary
Notary Public in and for the
State of Idaho
Residing at: Boise
My commission expires: Life

APPENDIX E

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR

BUREAU OF LAND MANAGEMENT
Idaho State Office
Federal Bldg.
550 W. Fort Street
Box 042
Boise, Idaho 83724

Max Weiss
329 E. Pine
Missoula, MT 59801

Nov. 8, 1979

Dear Mr. Weiss:

Your notice/certificate of mining claim location identified above is returned together with the filing fee, because "Evidence of Annual Assessment work/ Notice of Intent to Hold a claim or site" was not received in our office by October 22, 1979 as required by the Federal Land Policy and Management Act of 1976 (43 USC 1744) and the regulations in 43 CFR 3833.2(a). (Copy enclosed).

The regulations in 43 CFR 3833.4 (a) further provide that the failure to file such instruments as are required by sections 3833.1 and 3833.2 within the time periods prescribed therein shall be deemed conclusively to constitute an abandonment of the mining claim, mill site, or tunnel site and it shall be void. Subject to valid intervening rights of third parties or the United States, void or abandoned claims or

sites may be relocated and, based on new location date, the appropriate instruments may be refiled within the time period prescribed by the regulations.

The right of appeal to the Board of Land Appeals, Office of the Secretary of the Interior, within 30 days of receipt of this letter, is allowed in accordance with 43 CFR Part 4.411 (see enclosed form 184201). To avoid summary dismissal of an appeal, strict adherence to the regulations is necessary.

Sincerely yours,

/s/ Sharron Deroin
Chief, Branch of Records

APPENDIX F

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 Wilson Boulevard
Arlington, Virginia 22203

MAX WEISS

[49 IBLA 332]

IBLA 80-192 Decided August 25, 1980

Appeal from decision of the Idaho State Office, Bureau of Land Management, declaring various mining claims null and void. IMC 45403.

Affirmed.

APPEARANCES: Max Weiss, *pro se.*

OPINION BY ADMINISTRATIVE
JUDGE FISHMAN

This appeal is from a letter decision dated November 8, 1979, by the Idaho State Office, Bureau of Land Management (BLM), declaring 17 mining claims void for failure to file on or before October 22 (1979) either annual assessment statements or a notice of intention to hold the claims as required by the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and the pertinent regulation, 43 CFR 3833.2-1(a). That regulation provides:

§ 3833.2-1 When filing required.

(a) The owner of an unpatented mining claim located on Federal lands on or before October 21, 1976, shall file in the proper BLM office on or before October 22, 1979, or on or before December 30 of each calendar year following the calendar year of such recording, which ever date is sooner, evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claim.

Appellant's 17 "Kismet Group Mining Claims" in Shoshone County, Idaho, were located before October 21, 1976.

Appellant's certificates and amended certificates of location were timely filed with BLM on October 22, 1979. However, no evidence of annual assessment work or notice of intent to hold the claims was filed. Appellant indicates in his statement of reasons that "annual assessment labor has been performed each year except 1978 and 1979" for which years he was granted a deferment. Appellant further states that he made a good faith effort to comply with the recordation requirements, that he was not specifically aware of the requirement for recordation with BLM of evidence of assessment work or a notice of intent to hold the claim, and that his claims are a property right which should not be revoked without a hearing.

[1] The regulation above cited requires that owners of mining claims located prior to October 21, 1976, on Federal lands shall have filed in the proper BLM office on or before October 22, 1979, or on or before December 30 of each calendar year following the calendar year of such recordation, whichever is earlier, evidence of annual assessment work per-

formed during the preceding assessment year a notice of intention to hold the mining claim [*sic*]. This requirement is mandatory.

[2] Failure to comply with the regulations governing recordation of required data relating to unpatented mining claims must result in a conclusive finding that the claim has been abandoned. FLPMA section 1744(c); 43 CFR 3833.4(a); *G. H. Monk*, 47 IBLA 213 (1980); *Walter R. Paul*, 43 IBLA 119 (1979). The Kismet Group mining claims must be deemed conclusively to be abandoned and void for failure to submit on or before October 22, 1979, evidence of assessment work performed or notice of intention to hold the mining claims.

[3] Appellant's argument couching his mining claims as property rights of which he should not be deprived without a hearing has been addressed in previous decisions of the Board. In *Dorothy Smith*, 44 IBLA 25, 29 (1979), we stated:

> [E]ven if due process were construed to require the Department of the Interior to afford appellants some form of hearing prior to declaring their mineral location null and void, the requirement is satisfied by appellants' appeal to this Board. It is well established that where there are not disputed questions of fact and the validity of a claim turns on the legal effect to be given facts of record which show the status of the land when the claim is located, no hearing before an Administrative Law Judge is required. *United States* v. *Consolidated Mines & Smelting Co., Ltd.*, 455 F.2d 432 at 453 (9th Cir. 1971); *Dredge Corp.* v. *Penny*, 362 F.2d 889 (9th Cir. 1966), *aff'g The Dredge Corp.*, 64 I.D. 368 (1957); 65 I.D. 336 (1958); *H. B. Webb*, *supra*;

Roy R. Cummins, 26 IBLA 223 (1976); *David Loring Gamble*, 26 IBLA 249 (1976); *Vearl Martin*, 18 IBLA 234 (1974).

See also Alva Rockwell, 47 IBLA 272 (1980).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

/s/ Frederick Fishman
FREDERICK FISHMAN
Administrative Judge

We concur:

/s/ James L. Burski
JAMES L. BURSKI
Administrative Judge

/s/ Joseph W. Goss
JOSEPH W. GOSS
Administrative Judge

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